No. 91-2014

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

O'NEILL GROUP, et al., *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Under Chapter 11 of the Bankruptcy Code, when an employer who is a debtor in possession rejects its collective bargaining agreements with its employees, the employees are entitled to contract rejection damages. In this circumstance:

1. Must the employees forego their right to strike in order to preserve their entitlement to contract rejection damages?

2. Should contract rejection damages be limited by the hypothetical period the employer would have stayed in business if it had not rejected its collective bargaining agreements, even if the employer in fact stayed in business and even if rejection damages for other types of creditors are not so limited?

LIST OF PARTIES

Petitioners in this Court, appellants in the Fifth Circuit Court of Appeals, are several hundred past or present pilots and flight attendants of Continental Airlines, Inc. ("Continental"). They are denominated as "petitioners" or "the O'Neill Group" in this petition. Petitioners filed an Application to Extend Time to File a Petition for Writ of Certiorari on January 8, 1991, and the Court granted the application on January 9, 1991 (No. A-528). Annex A to that Application lists all of the petitioners.

RULE 29.1 STATEMENT

This petition is not filed by or on behalf of any corporation.

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The O'Neill Group hereby petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in the case known there as No. 89-2347, *In re Continental Airlines Corp.*

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reported at 901 F.2d 1259 (5th Cir. 1990) (hereafter cited as Appendix A). The Court of Appeals issued an unreported order denying timely petitions for rehearing and suggestions for rehearing *en banc* (Appendix G). The March 13, 1989 order of the United States District Court for the Southern District of Texas in this case is reproduced in Appendix E. The opinion and judgment of the United States Bankruptcy Court for the Southern District of Texas (Appendix D) is reported at 64 B.R. 865 (Bankr. S.D. Tex. 1986).

JURISDICTION

This case concerns Continental's conduct in connection with its first bankruptcy petition, which was filed in the United States Bankruptcy Court for the Southern District of Texas, No. 83-04019-H2-5, on September 24, 1983. The opinion and judgment of the Fifth Circuit were entered on May 25, 1990. During the period otherwise allowed to petitioners to petition for a writ of certiorari, Continental filed a second bankruptcy petition in the United States Bankruptcy Court for the District of Delaware, No. 90-932. To permit petitioners to confirm that this second bankruptcy petition stayed the present case pursuant to the automatic stay provision of the Bankruptcy Code, this Court, on January 9, 1991, extended the time for filing a petition for a writ of certiorari to March 28, 1991, No. A-528. On March 21, 1991,

the Fifth Circuit confirmed that Continental's second bankruptcy stayed the appellate proceedings arising from the first bankruptcy (Appendix H). Accordingly, the time for petitioning has been automatically extended pursuant to 11 U.S.C. § 108(c)(2).

Within the extended time this Court otherwise allowed to petition for a writ of certiorari, petitioners moved the Bankruptcy Court for the District of Delaware to lift the automatic stay (Appendix I). The Bankruptcy Court granted this motion for the limited purpose of permitting this petition for a writ of certiorari on May 12, 1992 (Appendix J). Therefore, this petition is filed within the time period specified by 11 U.S.C. § 108(c)(2), and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§ 365 and 502, and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, 155, and 156, are set forth in full in Appendix K.

STATEMENT OF THE CASE

This case involves claims by hundreds of former Continental pilots and flight attendants for contract rejection damages pursuant to §§ 365 and 502 of the Bankruptcy Code. The claims arise from Continental's September 24, 1983, bankruptcy in which it rejected its pre-existing collective bargaining agreements and imposed in their place "emergency work rules" that reduced wages and benefits by more than half. Rather than accepting Continental's unilateral and drastic changes in their wages and working conditions, the pilots and flight attendants embarked on a lawful strike. This petition asks this Court to consider (1) whether exercising their lawful right to strike divested these

employees of their statutory claim for damages, and (2) whether contract rejection damages should be limited by a hypothetical shutdown date.

A. The ALPA and UFA Labor Contracts.

For many years prior to September 24, 1983, Continental employed pilots and flight attendants under terms and conditions contained in labor contracts which it negotiated with the Air Line Pilots Association ("ALPA") and with the Union of Flight Attendants ("UFA"). The ALPA contract in force at the time of Continental's 1983 bankruptcy was dated August 18, 1982. In it, the pilots gave Continental about $100 million in wage and benefit concessions from their prior contract based on Continental's representation that it needed the concessions to continue its operations.

B. Continental's 1983 Bankruptcy, the Rejection of the ALPA and UFA Contracts, and the Emergency Work Rules.

On September 24, 1983, Continental ceased domestic flight operations and filed a bankruptcy petition under Chapter 11. On September 27, 1983, Continental filed a motion in bankruptcy court to reject its labor contracts with ALPA and UFA pursuant to 11 U.S.C. § 365. On that same day, just thirteen months after the pilots had given the company $100 million in wage and benefit concessions, Continental reopened its domestic flight operations under drastically changed terms and conditions known as "Emergency Work Rules." The Emergency Work Rules cut employee

wages by more than half and increased their work hours.[1] Continental did not negotiate with ALPA or the UFA over the Emergency Work Rules, but required pilots and flight attendants to work under them as a condition of continued employment.

C. The ALPA and UFA Strikes.

In response to the Emergency Work Rules, ALPA and UFA commenced lawful economic strikes on October 1, 1983. All of the petitioners honored and participated in their respective unions' strikes.

The UFA strike continued until April 17, 1985. On that date, the UFA made an unconditional offer to return to work on behalf of its striking members without reaching a strike settlement agreement. The ALPA strike continued until October 31, 1985, when the bankruptcy court entered an "Order and Award" containing the terms of a secret strike settlement reached between Continental and ALPA and presented to the bankruptcy court for entry as a court order.[2] On November 17, 1985, the court amended the Order and Award to reflect subsequent changes

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[1] For example, Continental cut the average captain's salary from $90,000 to $43,00 per year, the average first officer's salary from $64,000 to $31,510 per year, and the average second officer's salary from $45,000 to $26,510 per year. In an opinion rendered in connection with a striking pilot's application for dislocated workers' benefits under the Airline Deregulation Act of 1978, 49 U.S.C. §§ 1301 *et seq.*, the Department of Labor concluded that these drastic changes constituted a "constructive furlough or termination" of the affected employee.

[2] This Court already has reviewed the Continental strike and its settlement in *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127 (1991). Subsequent to Continental's first bankruptcy, and in part because of it, Congress amended the Bankruptcy Code to require at least a minimum of bargaining before employers could reject their labor contracts. *See* 11 U.S.C. § 1113. This amendment leaves intact the employer's ultimate right to reject its labor contracts and the statutory damages remedy at issue here.

negotiated by Continental and ALPA. Continental has not to date negotiated a new labor contract with either ALPA or the UFA.

D. The Present Litigation.

1. The bankruptcy court's dismissal of the pilots' and flight attendants' contract rejection claims on summary judgment.

The bankruptcy court approved Continental's rejection of the ALPA and UFA contracts on June 19, 1984 and December 5, 1984, respectively. The bankruptcy court's rejection orders stated that the contracts were rejected effective September 24, 1983, the date of the bankruptcy filing. ALPA, on behalf of its pilot members, and the UFA, on behalf of its flight attendant members, filed proofs of claim for contract rejection damages under 11 U.S.C. §§ 365(g) and 502(g).

Continental next filed a motion for partial summary judgment on April 30, 1985, asking the bankruptcy court to disallow the contract rejection claims of pilots and flight attendants for the time they were on strike. The bankruptcy court granted Continental's motion on September 10, 1985 for the following reason:

> Under well-established principles of federal labor law, striking employees are not entitled to back pay for the period they were on strike, even if the strike is a response to an unlawful unfair labor practice by the employer.

Because the unions had objected to the bankruptcy court's jurisdiction under 28 U.S.C. § 157(d) to interpret and apply federal labor law, the bankruptcy court alternatively estimated the value

of such claims as zero under 11 U.S.C. § 502(c) on the same grounds.

On September 20, 1985, Continental filed an additional motion for summary judgment in the bankruptcy court seeking to disallow the remaining pilot and flight attendant claims for contract rejection damages, including claims for time not on strike. On May 8, 1986, the court granted the motion as to the flight attendants and, on June 26, 1986, granted the motion as to the pilots. The following grounds were stated for both rulings:

> [B]ut for the Court's rejection of the collective bargaining agreements at issue here, [Continental] would have gone out of business and [the employees] could not have claimed lost future wages as damages, because the agreements did not guarantee future employment.

Because of the unions' jurisdictional objections, the bankruptcy court again alternatively estimated the claims at zero under 11 U.S.C. § 502(c). Finally, although unnecessary to its holding, the court also ruled that any employee claims for contract rejection damages would be cut off as of the amendable dates of their labor contracts and that the damages would be limited to one year's compensation under 11 U.S.C. § 502(b)(7).

2. The O'Neill Group intervention and appeals.

When the bankruptcy court dismissed the pilots' remaining contract rejection claims on June 26, 1986, it also held that proofs of claim filed by ALPA and the UFA on behalf of their members were improper, and permitted union members to intervene and pursue their contract rejection damage claims as individuals. The O'Neill Group previously intervened and filed a notice of appeal

from the June 26, 1986 summary judgment ruling. By that time, the UFA had appealed the bankruptcy court's May 8, summary judgment ruling against the flight attendants. Most of the flight attendants in the O'Neill Group therefore intervened in the UFA appeal.

The district court consolidated these appeals and scheduled oral argument on the consolidated appeals (and several other bankruptcy court appeals) for February 27, 1989. On that date, the district court announced in open court, without oral argument, that it would affirm the bankruptcy court's summary judgment rulings, and entered an order to that effect on March 13, 1989.

The Fifth Circuit (Garwood, J. dissenting), upheld the bankruptcy court's ruling that contract rejection damages were not available to the petitioners for the time they were on strike. Analogizing to back pay cases under labor law, the court reasoned that "[a]bsent constructive dismissal by the employer," the employees would not be entitled to back pay for the period of time they were on strike (App. A at 13A). The Fifth Circuit never determined whether there was a constructive dismissal by virtue of Continental's imposition of the emergency work rules, erroneously assuming that this question had been decided in a separate bankruptcy proceeding. Judge Garwood dissented, and pointed out that whether or not the employees were on strike, they still should be entitled to recover the difference between what they would have made under the rejected labor contracts and what Continental actually paid. He wrote that to deny employees all damages for the strike period "simply awards Continental a windfall" (App. A at 17A).

The Fifth Circuit also upheld the bankruptcy court's ruling that lost future wages were not recoverable where the debtor would have gone out of business absent the contract rejection. On this point, however, the Fifth Circuit remanded, holding that the pilots and flight attendants were entitled to contract rejection damages for the period Continental would have been able to continue operations under its labor contracts.[3]

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Opinion Creates An Unnecessary Conflict Between The Right To Strike Guaranteed Under The Railway Labor Act And The Right To Contract Rejection Damages Guaranteed Under The Bankruptcy Code.

We deal with a great national problem. Bankruptcy has become an accepted business practice in modern America. In 1989 and 1990 alone, there were 38,348 Chapter 11 bankruptcy petitions filed, involving such corporate giants as Federated Department Stores and Southland Corporation. New Generation Research, Inc., THE 1991 BANKRUPTCY YEARBOOK & ALMANAC 6, 32 (1st ed. 1991). The use of bankruptcy is especially common in the transportation industry where Continental Airlines, Greyhound Lines, Eastern Air Lines, and Braniff, to name but a few, have all sought protection under Chapter 11. *Id.* at 32-33.

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[3] The Fifth Circuit also held that it was only harmless error when the bankruptcy court judge accepted an offer of employment from the law firm representing Continental shortly after approving an award of $700,000 in legal fees to the firm.

Under Section 365 of the Bankruptcy Code, employers in bankruptcy are permitted to reject their collective bargaining agreements and set new terms and conditions of employment. 11 U.S.C. § 365; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984). When so rejected, the agreement is deemed breached the day before the Chapter 11 petition was filed, 11 U.S.C. § 365(g), and the employees' claims for damages are treated as unsecured pre-petition claims. *See NLRB v. Bildisco & Bildisco*, 465 U.S. at 530 n.12. Numerous employers who have filed for bankruptcy have used these provisions to finance their recoveries by cutting labor costs. *See, e.g., In re Mile Hi Metal Systems*, 899 F.2d 887 (10th Cir. 1990); *In re Landmark Hotel & Casino, Inc.*, 872 F.2d 857 (9th Cir. 1989); and *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986).

The employees' right to contract rejection damages is the *quid pro quo* for the employer's ability in bankruptcy to reject its labor contracts. The right to damages vests at the time the labor contract is rejected. Nothing in the Bankruptcy Code states or even suggests that the right to contract rejection damages is lost for any period during which employees subsequently exercise their lawful right to strike. Time and again, this Court has emphasized that the right to strike "is integral to the [Railway Labor] Act." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385-86 (1969). By misinterpreting the Bankruptcy Code, the Fifth Circuit punished these employees and held that they were compelled to continue working at whatever wages Continental chose to pay them and under any conditions that Continental chose to impose if they wanted to keep their damages claims under the Bankruptcy Code (App. A, pp. 13A-16A). On this important point, the Fifth Circuit has unnecessarily and unwisely created a conflict between the right to contract rejection damages and the right to strike. The result is a "windfall" for Continental and Judge Garwood rightly dissented.

A. The Fifth Circuit's Decision Creates a New Class of Indentured Servant — The § 502(g) Employee-Creditor.

Under § 502(g) of the Bankruptcy Code, an unsecured claim for damages is the exclusive remedy available for a debtor's breach of a labor contract, replacing the labor law remedies otherwise available outside of the bankruptcy.[4] 11 U.S.C. § 502(g). In *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), this Court observed:

> claims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. *See* 11 U.S.C. § 502(g); *In re Hoe & Co., Inc.*, 508 F.2d 1126, 1132 (2d Cir. 1974); *Workman v. Harrison*, 282 F.2d 693, 699 (10th Cir. 1960). Thus, suit cannot be brought against the debtor in possession under the collective bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.

465 U.S. at 530.

If upheld, the ruling below will permit employers to hold this unsecured interest hostage, forcing employees to choose between working at whatever wage the employer imposes or withdrawing their services and losing their sole remedy for their employer's

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[4] Under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, employees can obtain an injunction requiring the employer to abide by its labor contract, back pay for the time the employer did not follow the contract, and any other relief necessary to place them in the same position they would have been in but for the employer's unlawful conduct. *Mungin v. Florida East Coast Ry.*, 416 F.2d 1169 (5th Cir. 1969).

breach of the labor contract. There is no support in the bankruptcy law for such an inequitable result.

First, the courts have uniformly held that rejection of an employment contract may result in both rejection damages and a strike. In *Int'l Brotherhood of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460 (10th Cir. 1986), for example, the Tenth Circuit reversed the rejection of a collective bargaining agreement because, even though the employees were on strike, "both the bankruptcy judge and the district court failed to recognize that the rejections could generate burdensome claims against the estate." *Id.* at 1463. Thus, despite the strike, the court held that "claims may be filed for all losses attributable to the non-performance of the contracts, including payments due to all fringe benefit plans, loss of seniority rights, and all other provisions of the agreements." *Id.* The unavoidable conclusion from *IML Freight* is that a strike does not alleviate the debtor's liability for rejection claims.[5]

Second, the Code contains nothing that limits the ability of employees to participate in lawful strikes, the most effective economic weapon allowed by the labor laws. The result of the Fifth Circuit's decision is to allow debtors to use the bankruptcy process to subvert employees' labor law rights by effectively requiring them to forfeit accrued rejection claims if they strike. This is contrary to a substantial body of case law holding that the right to strike remains intact despite a bankruptcy. *See Briggs Transp.*

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[5] *See also In re Bildisco*, 682 F.2d 72, 80 (3d Cir. 1982) (in balancing equities to determine whether contract rejection should be allowed, bankruptcy court must consider the likelihood of both a strike and large damage claims), *aff'd*, 465 U.S. 513 (1984); *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985) (estimation of contract rejection damages required even though employees struck after court-approved rejection).

Co. v. Int'l Brotherhood of Teamsters, 739 F.2d 341 (8th Cir.) (bankruptcy court lacked jurisdiction to enjoin a strike or picketing), *cert. denied*, 469 U.S. 917 (1984); *Matter of Brada Miller Freight Sys., Inc.*, 702 F.2d 890, 899 (11th Cir. 1983) ("the impact of a potential strike on the debtor need also enter into the court's calculus"); *Truck Drivers Local 807 v. Bohack Corp.*, 541 F.2d 312, 318 (2d Cir. 1976) ("By filing under Chapter 11 an employer does not become clothed in immunity from union action.").

B. The Fifth Circuit's Decision Encourages the Massive Defeat of Employees' Rights Under the Bankruptcy and Labor Laws.

The Fifth Circuit decision, which is based on a serious misinterpretation of the Bankruptcy Code, deprives more than 450 Continental employees of their sole remedy for Continental's breach of its labor contracts. While the magnitude of the harm in this case alone is sufficient to warrant certiorari review, it is clear that the situation of the pilots and flight attendants is not unique. The rejection of labor contracts by debtors seeking to pay workers less or avoid fixed damage claims for layoffs is a familiar occurrence. *See In re Royal Composing Room*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986); *In re Texas Sheet Metals, Inc.*, 90 B.R. 260 (Bankr. S.D. Tex. 1988); *In re U.S. Truck*, 89 B.R. 618 (E.D. Mich. 1988); *Matter of Walway Co.*, 69 B.R. 967 (Bankr. E.D. Mich. 1987). If allowed to stand, this result will invite employers to continue to reject labor contracts and replace them with extremely harsh terms so as to encourage a strike and avoid liability for rejection damages. *See* App. A at 17A (Garwood, J. dissenting) (describing this aspect of majority's opinion as a "windfall" for debtor).

C. The Fifth Circuit's Decision, by Seriously Misinterpreting the Applicable Law, Cuts Off Petitioners' Only Available Remedy for Continental's Breach.

The Fifth Circuit's opinion means that a pilot like Joseph O'-Neill who, after twenty years with the airline, had his contract unilaterally rejected and his salary cut in half, is limited to contract rejection damages amounting to seven days' pay. The Fifth Circuit's holding is unsupported by bankruptcy law. Indeed, the Code expressly contemplates that contract rejection damages are recoverable even though "the employer directed the employee to terminate, or such employee terminated, performance under such contract." 11 U.S.C. § 502(b)(7)(A)(ii). *See Union Bank v. Wolas*, 112 S. Ct. 527 (1991) (where law is clear, a heavy burden exists to show Congress intended otherwise); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

The Fifth Circuit's reliance on unfair labor practice back pay cases to support its opinion is misplaced. The damages at issue here are not statutory damages flowing from an unfair labor practice, but rather those flowing from Continental's court-approved breach of its labor contract. Thus, the proper principles to apply are those of contract law, not the NLRB's rulings regarding statutory back pay. This basic point was correctly raised in Judge Garwood's dissent, App. A at 17A.[6]

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[6] When the debtor is allowed by the court to breach a labor contract by paying reduced wages and benefits, employees are under a duty to mitigate their damages by seeking other employment or continuing to work for the reduced wages and benefits. Even assuming that the employees who went on strike failed to mitigate their damages, such failure does not eliminate Continental's responsibility for its contract breach; at most, the failure of the pilots and flight attendants to mitigate reduces their claims by the amount Continental actually

(continued)

Even if the back pay cases applied, however, Continental's changes were so severe and pervasive that they constituted constructive discharge and justified back pay. *See NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 296 (5th Cir. 1980) (unilateral change contrary to collective bargaining agreement is constructive discharge), *aff'd in relevant part en banc*, 641 F.2d 351, 358-60 (5th Cir. 1981).[7] The damages remedy for constructive discharge is lost wages and benefits for the period of a strike, plus other equitable relief not available here because of Continental's bankruptcy.[8]

II. The Fifth Circuit's Decision Limiting Contract Rejection Damages Misapplies Fundamental Principles Of Law On Important Matters Going To The Heart Of The Bankruptcy System.

When a debtor (read "employer") rejects an executory contract, the rejection is treated as a pre-petition breach. 11 U.S.C.

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[6] *(continued)*
paid its working pilots. As stated by Judge Garwood, "there is no justification for denying them recovery for the difference between the revised work rule pay rates (and benefits) and those of the labor contracts; to do so simply awards Continental a windfall." App. A at 17A.

[7] The Panel avoided treating Continental's institution of its "Emergency Work Rules" as a constructive discharge by misconstruing *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D. Tex. 1985). The issue in that decision, however, was whether Continental's rejection was a "wrongful discharge" under state law, not whether it was a "constructive" discharge. The court concluded that the state law claim was preempted by the rejection remedy under the Code, and reserved the issue for decision in connection with the pilots' and flight attendants' pending contract rejection claims. The Department of Labor subsequently held that Continental's actions in this matter constituted a "constructive furlough or termination."

[8] *See Florida East Coast Ry. Co. v. Brotherhood of Locomotive Engineers*, 362 F.2d 482 (5th Cir. 1966); *Int'l Brotherhood of Elec. Workers v. A-1 Elec. Service*, 535 F.2d 1 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976); *Film Projects, Inc.*, 231 N.L.R.B. No. 146 (1977).

§§ 365(g), 365(g)(1). To compensate for the rejection, the creditors (read "employee") receives an unsecured claim against the estate for the contract damages flowing from the breach. 11 U.S.C. § 502(g); 3 COLLIER ON BANKRUPTCY ¶ 502.07 (15th ed. 1992). In short, the Bankruptcy Code:

> gives entities injured by the rejection of an executory contract . . . a pre-petition claim for any resulting damages, and requires that the injured entity be treated as a pre-petition creditor with respect to that claim.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 354 (1977); S. Rep. No. 989, 95th Cong., 1st Sess. 65 (1978).

Purporting to apply this statutory scheme, the Fifth Circuit determined that the pilots and flight attendants here could not recover the bulk of the damages flowing from Continental's breach of its labor contracts with them because the agreements did not guarantee future employment:[9]

> The collective bargaining agreement in the present case provides no guarantees of continued employment. Hence, even if the present agreement had not been cancelled, damages would only be available for the time Continental would have been able to continue in business. . . .

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[9] In connection with this ruling, the Fifth Circuit remanded the case for a finding of when Continental would have ceased operations, stating that contract rejection damages were available up to that point. This limited relief is largely illusory, however, since the court also held that damages were not available for the time pilots and flight attendants were lawfully on strike, which covers all but one week of the period Continental would have remained in operation. *See* § I, *supra*.

(App. A at 12A). Stated differently, the court's analysis is: (1) Continental would have eventually ceased operating had it not rejected its labor contracts; (2) if this happened, the pilots would not have jobs; and (3) without guaranteed jobs, no damages could accrue.

A. Limiting Damages Based on Speculation of a Shutdown Contravenes Basic Bankruptcy Law.

The Fifth Circuit opinion allows bankrupt employers who breach their labor contracts to limit their employees' claims for damages by saying that it was only the breach of contract that allowed them to remain in business.[10] Not surprisingly, the decision below is the only authority for this proposition.

1. The decision violates Bankruptcy Code requirements for treating all creditors equally.

No bankruptcy authority supports the Fifth Circuit's decision to limit damages to "the time Continental would have been able to continue in business." App. A at 12A. The Bankruptcy Code does not authorize, as part of the calculation of contract rejection damages, a court to consider what would have happened without the rejection or which of the debtor's obligations caused the insolvency. Nor does the Code permit a court to disallow damages for contracts that otherwise would have caused the debtor to cease operations.

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[10] As noted by one commentator: "If the same logic were followed in awarding damages for the repair of a fender crumpled in an intersection collision, the plaintiff would be denied full recovery for the fender because it might have been damaged in some other way sooner or later." W. Holloway & M. Leech, *Employment Termination Rights and Remedies* at 402 (1985).

Not only is the Fifth Circuit's decision unsupported by bankruptcy law, it directly violates the fundamental tenet that all creditors be treated equally. *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945). By limiting the employees' damages to the time Continental hypothetically could have continued operations, the Fifth Circuit violated this principle in treating the employees, *qua* unsecured creditors, differently from and worse than other unsecured creditors of Continental.

Specifically, Continental elected to reject its contracts with the pilots and flight attendants and to continue operations. With the exception of its employees, Continental paid all of its unsecured creditors in full, even those whose contracts it rejected. Only the pilots and flight attendants were not paid, even though the Fifth Circuit's imaginary demise of the airline should have affected all unsecured creditors equally by cutting off payments to both employees and nonemployees. In short, the Fifth Circuit allowed Continental to use the unsecured interests of its pilots and flight attendants to fly itself out of bankruptcy and pay off its other creditors.

2. The ruling contradicts this Court's decision in *NLRB v. Bildisco & Bildisco*.

In *Bildisco*, this Court held that contract rejection damages are considered unsecured claims against the bankruptcy estate. As to what items of damage were recoverable, this Court stated:

> Section 502(c) provides that any contingent or unliquidated claim shall be estimated for purposes of settling a bankrupt estate. Under this provision losses occasioned by the rejection of a collective-bargaining agreement must be

> estimated, including unliquidated losses attributable to fringe benefits or security provisions like seniority rights. . . .

465 U.S. at 530 n.12.

The limitation on future wages as contract rejection damages in this case cannot be reconciled with *Bildisco*.[11] There is no logical distinction between future fringe benefits and lost wages; both arise only if the debtor continues to employ its workers. *Accord In re U.S. Truck Co.*, 89 B.R. 618, 624 (E.D. Mich. 1988) (rejecting same debtor argument and holding "the logic in *Bildisco* extends to lost future wages"). Unlike the court below, the *Bildisco* Court

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[11] The Fifth Circuit attempted to distinguish *Bildisco* by saying that it merely attempted to clarify § 502(c), "which requires the estimation of unliquidated claims *if such are otherwise recoverable*." App. A at 11A (emphasis in original). First, nowhere in its opinion did this Court imply that only "otherwise recoverable" claims are to be estimated.

Second, the pilots' and flight attendants' claims in this case are "otherwise recoverable." In the 1978 amendments to the Bankruptcy Code, Congress eliminated restrictions on the distribution of unliquidated or contingent claims such as those here. *See* 3 COLLIER ON BANKRUPTCY ¶ 502.03, at 502-72 (15th ed. 1992) (discussing former 11 U.S.C. § 57d). Under the Code as it now stands, a recoverable claim includes any

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .

11 U.S.C. § 101(5)(A). *See also Bildisco*, 465 U.S. at 530 n.12 (noting that Congress provided more protection to unsecured creditors, such as employees of a debtor, whose interests were overlooked and underestimated in the past with the 1978 Act). The Fifth Circuit's reliance on the possibility that Continental would have ceased operations returns bankruptcy law to its pre-1978 roots of disallowing disputed or contingent claims. The policy of the Code now is to allow these types of claims, and the possibility that the employer may cease operations is irrelevant.

did not impose any added condition that employees claiming rejection damages demonstrate a guarantee of continued employment.

B. The Fifth Circuit's Decision Establishes a Measure of Contract Rejection Damages Under § 502 That Is At Odds With Basic Contract Law Principles.

As noted, an executory contract rejected under § 365 is treated as a pre-petition breach which allows the nondebtor to recover conventional contract damages. Section 502(b)(1) of the Bankruptcy Code requires that the value of a § 365 breach is determined in precisely the same way that such a claim would be if a bankruptcy had not occurred. In limiting damages to the time it thought Continental would have remained in business, the Fifth Circuit abandoned the directive of § 502(b)(1) and contradicted well-established case law on contract damages.

Accepting the Fifth Circuit's premise that the labor contracts here did not guarantee employment, then the contracts are, by the lower court's account, simple requirements contracts. The buyer (Continental) agreed to fill its requirements for a particular product (labor) over a specified period of time from a seller (ALPA and the UFA), who agreed to make the product available at a specified price (the terms of the labor contracts). It is beyond dispute that a buyer subject to a requirements contract who meets continuing needs by purchasing the product elsewhere is liable to the seller for breach of contract, and that damages are the amount

of the product the buyer acquired elsewhere, multiplied by the contract price, less any mitigation.[12]

These principles apply here. Continental continued to require pilots and flight attendants after the filing of its bankruptcy petition, but obtained these services at prices below the terms of its rejected labor contracts. Like any other requirements supplier, the pilots' and flight attendants' damages must be based on the original contract terms and the requirements Continental subsequently had, not speculation that Continental would have no needs at all.

This is the result reached in the only other reported decision addressing the measure of damages for rejection of a labor contract. *In re U.S. Truck Co., Inc.*, 89 B.R. 618 (E.D. Mich. 1988), *aff'g* 74 B.R. 515 (Bankr. E.D. Mich. 1987). There, both the district court and the bankruptcy court measured damages based on the fact that the debtor continued to employ workers after rejecting its labor contract with them, rather than on a hypothetical decision to go out of business, and expressly rejected the bankruptcy court holding affirmed by the Fifth Circuit below. The district court properly analyzed this issue as follows:

> If U.S. Truck had ceased operations and liquidated, the [employees] would have had no claim against it for future lost wages . . . .

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[12] *See Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1362 (10th Cir. 1989); *Universal Power Sys. v. Godfather's Pizza*, 818 F.2d 667, 673 (8th Cir. 1987); *Center Chemical Co. v. Avril, Inc.*, 392 F.2d 289 (5th Cir. 1968); *Globemaster, Inc. v. Magic American Chemical Corp.*, 386 F.2d 420 (6th Cir. 1967); *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960); *Texas Industries v. Brown*, 218 F.2d 510 (5th Cir. 1955); *Haveg Corp. v. Guyer*, 226 A.2d 231 (Del. 1967).

> [However,] U.S. Truck and its trustee determined that the interests of the creditors and the debtor were best served by continued economic activity. Therefore, a decision was made that employment should continue during the period of time that the claimed damages accumulated. This situation of continuing employment has no relation to a context where no employment was available during specific parts of a company's annual business cycle. In fact, to the extent the court should look to the actual operations of the company to determine what damage award is appropriate, the continued employment of part of U.S. Truck's workforce militates in favor of finding damages for pay lost through the 10-percent reduction in wages. . . .
>
> [T]he court cannot say what would have happened had the company decided to liquidate. A buyer might have been found; for example, who would have continued the operations of U.S. Truck. Rather than speculate as to what might have occurred, the court believes it is the better course to look at the actual events. Because U.S. Truck continued to employ workers, these workers should be an unsecured creditor for the difference between what they were paid and the amounts contemplated by the Agreement.

89 B.R. at 625-26. *See also Local 461 v. Singer Co.*, 540 F. Supp. 442, 450 (D.N.J. 1982). By failing to distinguish or reconcile *U.S. Truck*, the Fifth Circuit's decision creates great uncertainty in this area of the law.

The Fifth Circuit's opinion places the entire burden of Continental's bankruptcy on one discrete group of creditors — the employees — and, in doing so, ignores the fundamental con-

tract law principle that speculation about what "might have been" cannot support or limit an award of damages.

CONCLUSION

The decision below conflicts with basic bankruptcy and labor law. The Fifth Circuit's view of the Bankruptcy Code as it applies to the determination of contract rejection damages is not only seriously in error, but is fundamentally harsh and unjust. In light of the central role of labor contracts in the economic arena, and the increasing use of the bankruptcy laws by employers, the public importance of this question is so great that this petition should be granted.

RESPECTFULLY SUBMITTED, June 1992.

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APPENDIX A

APPENDIX A

In re CONTINENTAL AIRLINES CORP., et al., Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and James C. Stephens, et al., Appellants,

v.

CONTINENTAL AIRLINES, INC., et al., Appellees.

O'NEILL GROUP, Appellants,

v.

CONTINENTAL AIRLINES, INC., et al., Appellees.

UNION OF FLIGHT ATTENDANTS, Appellant,

v.

CONTINENTAL AIRLINES, INC., et al., Appellees.

No. 89-2347.

United States Court of Appeals, Fifth Circuit.

May 25,1990.

Randolph J. Haines, Marty Harper, Allen Clarke, Jessica Franken, Lewis & Roca, Phoenix, Ariz., for appellants.

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James R. O'Donnell, Leon V. Komkov, Butler & Binion, Houston, Tex., for Stephens Group.

Barbara Gardner, Mandell & Wright, Houston, Tex., Bruce Simon, Babette Ceccotti, Cohen, Weiss, & Simon, New York City, Kathleen M. Schaden, Schaden, Heldman & Lampert, Denver, Colo., Christopher Cameron, Taylor, Roth, Bush & Geffner, Burbank, Cal., Daniel P. Casey, Continental Airlines, Inc., Houston, Tex., for appellees.

John J. Gallagher, Charles L. Warren, Jon A. Geier, Aiken, Gump, Strauss, Hauer & Feld, Washington, D.C., Lenard Parkins, Sheinfeld, Maley & Kay, Houston, Tex., for Continental Airlines, Inc.

Appeals from the United States District Court for the Southern District of Texas.

Before GEE, REAVLEY, and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Today's case presents the question whether employees whose collective bargaining agreements are rejected in a Chapter 11 bankruptcy are entitled to future wages and benefits as contract rejection damages under 11 U.S.C. § 502(g). Recognizing that the agreements here at issue do not guarantee employment, we hold that the difference between the wages and benefits set out in the agreements and the wages and benefits actually paid under the emergency work rules are recoverable as unsecured claims to the extent that work would have been available had the agreements not been rejected. The bankruptcy court dismissed all employee claims without considering how long Continental could have

remained in business absent rejection of the agreements. For this and other reasons to be stated, we reverse and remand the cause to the bankruptcy court to allow it to make a specific finding of when Continental would have had to cease operations had it not cancelled its labor contracts, and to calculate appropriate damages to that date.

I. *Facts*

In 1983, Continental halted domestic flight operations and filed a bankruptcy petition under Chapter 11. Continental then filed a motion in bankruptcy court to reject its labor contracts with the Air Line Pilots Association, International ("ALPA") and the Union of Flight Attendants ("UFA") pursuant to 11 U.S.C. Section 365. That same day, Continental recommenced its domestic flights under what it termed "Emergency Work Rules," rules that changed dramatically the employees' terms and conditions of employment. As a result, ALPA and UFA called strikes.

The bankruptcy court approved Continental's rejection of its labor contracts with ALPA and UFA and ordered the rejection effective the date of the bankruptcy filing. ALPA and UFA then filed proofs of claim, in amounts of $408 million and $409 million respectively, for contract rejection damages under 11 U.S.C. Sections 365(g) and 502(g). These claimed damages consisted of the full wages and benefits set forth in the rejected labor contracts, for time periods beginning from the date of the bankruptcy filing up to and somewhat beyond the contracts' amendable dates.

In October of 1985, Bankruptcy Judge T. Glover Roberts, acting by agreement between Continental and ALPA, signed an "Order and Award" that was intended to settle all issues between Continental and ALPA, including the contract rejection damage

claims. Because of objections raised by certain individual pilots, the court allowed pilots who did not participate in the settlement to file proofs of claim and pursue their derivative share of the claims originally filed by ALPA. A like settlement agreement was reached between Continental and UFA, with a procedure created which was similar to that for the pilots, allowing non-settling flight attendants to pursue their claims independently of UFA. In all, approximately 460 pilots and 14 flight attendants have filed proofs of claim seeking contract rejection damages under the procedures established by the bankruptcy court.

In a motion for partial summary judgment, Continental next asked the bankruptcy court to disallow contract rejection damages claims for the time that the employees were on strike. When that motion was granted on September 10, 1985 ("September 10 Order"), Continental filed an additional motion for summary judgment seeking to disallow the remaining claims for contract rejection damages. This was granted as to the claims of the flight attendants on May 8, 1986 ("May 8 Order"), and as to the pilots' claims on June 26 of the same year ("June 26 Order"). The court reasoned that as the collective bargaining agreements did not guarantee employment, the claimants were not entitled to future wages and benefits as contract rejection damages. The orders were appealed to federal district court, which affirmed them.

II. *Discussion*

A. Failure to Stand Recused

The appellants contend that Judge Roberts, who shortly after making his May 8 and June 26 orders received and accepted an offer for partnership in the law firm representing Continental,

should have stood recused from the case and that his failure to do so requires the reversal of those orders.

Several months before making his rulings in this case, Judge Roberts had announced his intentions to enter private practice and to stop handling the Continental bankruptcy cases to avoid conflicts of interest in the event he considered employment with any of the firms appearing before him. Shortly thereafter, Continental's local bankruptcy counsel, Messrs. Sheinfeld, Maley & Kay ("Sheinfeld"), discussed hiring Judge Roberts at a partnership meeting. Before his confirmation of Continental's plan of reorganization, at least two Sheinfeld lawyers had asked Judge Roberts about his future employment plans. At about the same time, Judge Roberts was quoted as praising Continental's President Frank Lorenzo in articles which appeared in Business Week and the Wall Street Journal.[1]

Judge Roberts granted summary judgment disallowing all contract rejection damage claims in orders made on May 8 and June 26,1986, and confirmed Continental's plan of reorganization on June 30. On July 1, Judge Roberts granted various fee requests made by counsel, including a $700,000 fee to Sheinfeld. On July 2, Sheinfeld contacted Judge Roberts about joining their partnership. On July 29, Judge Roberts agreed to join the firm and did so on September 5 of the same year.

28 U.S.C. Section 455(a) requires a judge to stand recused "in any proceeding in which his impartiality might reasonably be

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[1] Judge Roberts was reported to have said concerning Frank Lorenzo: "'Who do you know with the guts to put half a billion dollars on the table and say he can do a turnaround' of a company that is a prime candidate for bankruptcy.... If anybody can do it, Lorenzo can." *Frank Lorenzo, High Flier*, Business Week, March 10, 1986 at 104, 107.

questioned." Because the goal of Section 455(a) "is to exact the appearance of impartiality," recusal may be mandated even though no *actual* partiality exists. *Hall v. Small Business Admin.*, 695 F.2d 175, 178 (5th Cir. 1983). The standard for recusal is an objective one, that if a "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 800 (5th Cir. 1986), *aff'd*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

In the present case there is no allegation that, prior to his rulings in this case, Judge Roberts had sought employment with the Sheinfeld firm, or that he knew that the firm was actively considering him. The close coupling of Judge Roberts's rulings with the employment offer and his acceptance of it, however, does create the appearance that he may have been pursuing employment with Sheinfeld while he was presiding over the case. As the Seventh Circuit noted in *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985):

> The appearance of equal justice requires that the judge not be exploring the prospects of employment with one lawyer or all lawyers appearing in a case before him. The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary.

Id. at 461.

Continental contends that a judge cannot be expected to stand recused in a case when he is unaware that counsel for one of the

parties appearing before him is considering him for employment. The Supreme Court, in *Liljeberg v. Health Services Corp.*, responded to a similar contention:

> Contrary to petitioner's contentions, this reading of the statute does not call upon judges to perform the impossible — to disqualify themselves based on facts they do not know. If, as petitioner argues, § 455(a) should only be applied prospectively, then requiring disqualification based on facts the judge does not know would of course be absurd; a judge could never be expected to disqualify himself based on some fact he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know. But to the extent the provision can also, in proper cases be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that "his impartiality might reasonably be questioned," then he should also find that the statute has been violated. This is certainly not an impossible task.

486 U.S. 847, 861, 108 S. Ct. 2194, 2202-03, 100 L. Ed. 2d 855, 873 (1988). Similarly, to hold that § 455(a) was violated in the present case does not mean that Judge Roberts was required to stand recused before discovering that he was being considered for employment. Rather, when an offer of employment was received the day after his approval of $700,000 in legal fees to the firm making the offer, Judge Roberts was "required to take the steps necessary to maintain public confidence in the judiciary." In the circumstances of this case Judge Roberts should either have rejected the offer outright, or, if he seriously desired to consider

accepting the offer, stood recused and vacated the rulings made shortly before the offer was made. Although we are confident that Judge Roberts committed no substantive impropriety in his handling of the motions in this case, we nevertheless conclude that recusal was mandated by the appearances of the situation which we have described.

Although a violation of § 455(a) has occurred in the present case, reversal is not automatic. As with other areas of the law, the "harmless error" rule applies to a breach of a judge's duty to stand recused under § 455(a). *Liljeberg*, 486 U.S. at 861-62, 108 S. Ct. at 2202-03, 100 L. Ed. 2d at 873-74. In determining whether reversal is mandated by a failure to stand recused, a number of factors warrant our careful consideration: The risk of injustice to the parties in this particular case; the risk that the denial of relief will produce injustice in other cases; the risk of undermining the public's confidence in the judicial process. *Id.* at 864, 108 S. Ct. at 2204, 100 L. Ed. 2d at 875.

The risk of injustice to the parties in allowing a summary judgment ruling to stand is usually slight. Such rulings are subject to de novo review, with the reviewing court utilizing criteria identical to that used by the court below. In cases where we would otherwise affirm such a ruling, little would be gained by vacating and remanding with instructions that it be essentially reinstated.[2]

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[2] The Eleventh Circuit noted in a similar situation:

> As discussed previously, we agree with the district court that summary judgment was proper. It would, therefore, be ridiculous to remand this case and reassign it to another judge after we have already exercised plenary review and have concluded that summary judgment was proper.

Parker v. Connors Steel Co., 855 F.2d 1510, 1526 (11th Cir. 1988), *cert. denied*, — U.S. —, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989).

Next, we consider whether a failure to vacate the orders below would be likely to produce injustice in other cases. We seriously doubt that a failure to vacate the decisions of the bankruptcy court could be read in future cases as a nod of approval for Judge Roberts's handling of the situation; rather, our ruling here should serve as a caution to other judges who are contemplating private employment following retirement. Moreover, were we to vacate the orders below for the § 455 violation alone, injustice to other Continental creditors might result from the delay in finishing Continental's plan of reorganization.

Finally, we consider whether the public's confidence in the judicial process will be undermined if we hold Judge Roberts's violation of Section 455(a) to be harmless error. We are aware of the high profile the Continental bankruptcy has had before the public and that the circumstances surrounding Judge Roberts's retirement from the bench have not gone unnoticed by the press.[3] That we have ruled Judge Roberts's actions to be violative of Section 455(a) should serve to restore some of any public confidence lost as a result of the violation; whether vacating the orders granting summary judgment for the sake of appearances alone would help or hinder the restorative process, however, is not clear. As the Eleventh Circuit has noted, in similar circumstances:

> In fact, if we reverse and vacate a decision that we have already determined to be proper, the public will lose faith in our system of justice because the case will be overturned without regard to the merits of the employees' claims. Judicial decisions based on such technical arguments not relevant to the merits contribute to the public's distrust in our system of justice.

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[3] *See* Texas Lawyer, Dec. 1-5, 1986, at 1; Wall St. J., Oct. 6, 1986, at 24, col. 1.

Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, — U.S. —, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989). We accordingly hold that the Section 455(a) violation in the present case constituted harmless error.

B. Contract Rejection Damages

Bankruptcy Code Section 365 permits an employer to reject a collective bargaining agreement and set new terms and conditions of employment. 11 U.S.C. § 365; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S. Ct. 1188, 1198-99, 79 L. Ed. 2d 482 (1984). When so rejected, the agreement is deemed breached the day before the Chapter 11 petition was filed. 11 U.S.C. § 365(g). Section 502(g) provides a remedy for this breach in lieu of the labor law remedies which would have been available outside bankruptcy. The appellants contend that, in addition to accrued wages and benefits, future wages and benefits are recoverable as of right as Section 502 contract rejection damages.

In support of their contention that the district court erred in rejecting their damage claims, the appellants rely principally upon *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1983), in which the Supreme Court held that the authority of a debtor-in-possession to seek the rejection of a collective bargaining agreement was not subject to the modification restrictions of Section 8(d) of the NLRA. In a footnote the Court stated that the "losses occasioned by the rejection of a collective-bargaining agreement must be estimated, including unliquidated losses attributable to fringe benefits or security provisions like seniority rights." *Id.* at 530 n. 12, 104 S. Ct. at 1198 n. 12. The appellants read this portion of the opinion as mandating the award of contract rejection damages whenever a collective bargaining agreement is breached. The plaintiffs fail to recognize,

however, that this footnote was simply the Court's attempt at clarifying Section 502(c), which requires the estimation of unliquidated claims *if such are otherwise recoverable*. *Id.* at 530, 104 S. Ct. at 1198. Whether certain types of damages are recoverable under Section 502 will depend upon the particular contract at issue and the circumstances surrounding its rejection.

1. Collective bargaining agreements

Unlike a contract of employment, ordinarily a collective bargaining agreement does not create an employer-employee relationship; and its rejection does not terminate an employment relationship. It neither obligates any employee to perform work nor requires the employer to provide work. It is simply "a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plan." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550, 84 S. Ct. 909, 915, 11 L. Ed. 2d 898 (1964). As has been noted by the Supreme Court:

> [C]ollective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to the terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.

J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 335, 64 S. Ct. 576, 579, 88 L. Ed. 762 (1944). Unless a collective bargaining agreement guarantees future employment, lost future wages and benefits as damages for its breach are not recoverable in periods when no work would have been available. *See, e.g., NLRB v. Biscayne Television Corp.*, 337 F.2d 267, 268 (5th Cir. 1964); *Nabors v. NLRB*, 323 F.2d 686, 690 (5th Cir. 1963), *cert. denied*, 376 U.S. 911, 84 S. Ct. 666, 11 L. Ed. 2d 609 (1964); *NLRB v. Columbia Tribune Publishing Co.*, 495 F.2d 1384, 1393 (8th Cir. 1974).[4] Likewise, employees working under such an agreement are not entitled to lost future wages if the employer ceases operations. *See, e.g., J.I. Case, supra; Fraser v. Magic Chef — Food Giant Markets, Inc.*, 324 F.2d 853 (6th Cir. 1963); *Bakery & Confectionary Workers Intern. Union of America v. Great Atlantic & Pacific Tea Co.*, 357 F. Supp. 1322 (W.D. Pa. 1973), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1974); *Abbington v. Dayton Malleable, Inc.*, 561 F. Supp. 1290 (S.D. Ohio 1983), *aff'd mem.*, 738 F.2d 438 (6th Cir. 1984).

The collective bargaining agreement in the present case provides no guarantees of continued employment. Hence, even if the present agreement had not been cancelled, damages would only be available for the time Continental would have been able to continue in business. In rejecting all of the appellants' damage claims, Judge Roberts relied upon a previous finding, not here appealed, "that had Continental not made its unilateral changes in pilot pay and work rules[ ] it would have been unable to con-

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[4] Although these cases were decided under the NLRA (the present contract is governed by the RLA), courts have often looked to decisions under the NLRA for guidance in RLA matters. *See generally Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 109 S. Ct. 1225, 1230, 103 L. Ed. 2d 456 (1989); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S. Ct. 1109, 1117-18, 22 L. Ed. 2d 344 (1969).

tinue its operations for very much longer for want of necessary cash," and that absent the implementation of the September 27 Emergency Work Rules, "Continental would have run ... [out] of cash" and "would have had to shut its doors even before this hearing commenced," that date being January 30,1984. Recognizing that if Continental went out of business, the employees would have no damage claims under the agreement, Judge Roberts held that no damages should be available under Section 502(g). Although the reasoning utilized by Judge Roberts in rejecting the claims parallels our own here, he failed to recognize that the finding relied upon suggests that Continental *could have* continued to operate under its labor contracts for *some* period of up to four months following September 27, 1983. As the employees operating under the agreement would have had a claim for damages — accruing until Continental ceased operations — had the contract not been rejected, they are entitled to contract rejection damages for the same period. These damages are to be considered unsecured claims measured by the differences in the rates of pay and fringe benefits set forth in the agreements and the pay and benefits actually received under the Emergency Work Rules.

2. Effect of the strike

The appellants contend that contract rejection damages should be available for the time the employees were out on strike. As noted above, the purpose of Section 502(g) is to give the same remedy as would be available had the contract not been rejected. Absent constructive dismissal by the employer,[5] employees who strike are not ordinarily entitled to back pay for the period for

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[5] In a previous order not here appealed, the bankruptcy court held that Continental's action in rejecting its collective bargaining agreements did not constitute a constructive discharge. *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D. Tex. 1985).

time they are on strike, even if the strike is in response to an unfair labor practice. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 n. 7, 61 S. Ct. 845, 854 n. 7, 85 L. Ed. 1271 (noting that the NLRB does not award backpay for an unfair labor practice strike); *J.H. Rutter-Rex Manuf. Co. v. NLRB*, 399 F.2d 356, 361 (5th Cir. 1968), *rev'd on other grounds*, 396 U.S. 258, 90 S. Ct. 417, 24 L. Ed. 2d 405 (1969) (liability for backpay to unfair labor practice strikers begins with application for reinstatement); Studio 44, Inc., 284 N.L.R.B. No. 67 at 13 n. 22 (1987) ("It is well settled that unfair labor practice strikers are not entitled to reinstatement and back-pay until they have made an unconditional offer to return to work"); Comfort, Inc., 152 N.L.R.B. 1074, 1090 (1965), *enforced, NLRB v. Comfort, Inc.*, 365 F.2d 867 (8th Cir. 1966). As no damages would have been available to Continental employees for the time when they were on strike outside of bankruptcy, none should be given in this instance.

The cases relied upon by the appellants do not dictate a different outcome. For example, the appellants cite our decisions in *Mungin v. Florida East Coast Railway Co.*, 416 F.2d 1169 (5th Cir. 1969) and *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905, 89 S. Ct. 1747, 23 L. Ed. 2d 219 (1969), in support of their contention that a back pay remedy is available for striking employees. In both of these cases the disputed actions of the carriers constituted violations of § 6 of the Railway Labor Act, for which we ruled that back-pay could be awarded as a sanction, calculated from the time of the wrongful discharge until the employees were reinstated pending bargaining. *Id.* at 328. We noted that the purpose of the sanction was to recreate, so far as possible, the status quo before the wrongful action was taken and to maintain it until the carriers complied with the good faith bargaining required by § 6 of the Act. *Id.* at 329.

The plaintiffs' reliance upon *Mungin* and *Galveston Wharves* in the present instance is misplaced. Continental's rejection of the collective bargaining agreement, unenforceable from the time of the bankruptcy filing, involved no statutory violation.[6] In consequence, we ave no such concern to preserve the status quo pending statutory compliance as we had in *Mungin* and *Galveston Wharves*. We noted the distinction between cases involving statutory violations and those involving breach of contract in both *Galveston Wharves* and *Mungin* when we stated: "'But the employees here do not claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant.'" *Mungin*, 416 F.2d at 1177 (quoting *Galveston Wharves*, 400 F.2d at 327). Similarly, as the claims here involved are for contract rejection damages, our holdings concerning sanctions for statutory violations are not relevant.

Another case relied upon by the appellants, *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d. Cir. 1979), actually supports our ruling here. In *Carpenter*, an employer's unilateral change in wages and benefits prompted its union employees to strike. An Administrative Law Judge found the employer to have committed an unfair labor practice and ordered the strikers be reinstated with back pay. This order was modified by the NLRB to include a back pay award for the strike replacements as well. On appeal, the

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[6] In *Bildisco*, the Supreme Court ruled that "the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again." 465 U.S. at 532, 104 S. Ct. at 1199. The Court held that an employer did not commit an unfair labor practice by unilaterally imposing new conditions of employment between the time of bankruptcy filing and the time the contract is either affirmed or avoided. *Id.* This holding has been superseded by statute. *See* 11 U.S.C. § 1113. The new statute does not apply, however, to bankruptcy petitions such as this one, filed before July 10, 1984.

court in *Carpenter* enforced only that portion of the Board's order which awarded back pay to the reinstated strikers. The appellants assume that the back pay was to run from the beginning of the strike. A reading of the Board's order itself, however, reveals that the award was to consist of "the difference between the wages and other economic benefits which [the workers] *actually received* and the economic benefits which they would have received absent Respondent's unlawful conduct." 238 N.L.R.B. 974, 976 (1978). The Board ruled that the employer's "liability for back pay shall commence as of the date of the employee's unconditional offer to return to work." *Id.* (citing Newport News Shipbilding and Dry Dock Co., 236 N.L.R.B. 1637 (1978)).

III. *Conclusion*

The September 10 order of the bankruptcy court granting the debtor's motion for partial summary judgment, which disallowed contract rejection damages for time periods the employees were out on strike, is AFFIRMED. The May 8 and June 26 orders of the bankruptcy court granting the debtor's motion for summary judgment, which disallowed all contract rejection damage claims of the appellants, are VACATED and the cause REMANDED for proceedings consistent with this opinion.

GARWOOD, Circuit Judge, dissenting in part.

I join all Judge Gee's cogent opinion save for what is, under the facts of this case, a relatively minor disagreement as to the employee-claimants' entitlement to damages. During the period in which Continental could have continued to operate under its labor contracts, as indicated in part B1 of the majority opinion, I would allow the striking employees to recover amounts not exceeding the difference between the rates and benefits actually

paid by Continental during that time and those that would have been paid had the provisions of the labor contracts been followed.

I agree that this is not a statutory violation or unfair labor practice act case. I also agree that the strikers were not constructively discharged. Nevertheless, under basic principles of contract law, when Continental clearly repudiated its labor contracts by unilaterally reducing the agreed rates of pay, the employees were no longer required to tender performance.[1] As appropriate work at Continental indisputably continued to be available to the striking employees, the doctrine of avoidable consequences prevents their recovery of what they could have thus earned had they not been on strike. But there is no justification for denying them recovery for the difference between the revised work rule pay rates (and benefits) and those of the labor contracts; to do so simply awards Continental a windfall.

A hypothetical example will illustrate my point. On January 1, A hires B to perform all of A's audit work, for as long during the year as A has need for such, with B's compensation to be at the rate of $5,000 a month. Sometime in June, A informs B that, because A believes good auditors are available at $3,500 a month, B's wages for the final half of the year will be only $3,500 a month. Accordingly, B then accepts, effective July 1, an offer for similar work from C which pays $4,000 a month for the July 1 to December 31 period, and A promptly hires a replacement for B who works throughout the same time for $3,500 a month. I would allow B to recover $6,000 from A. The majority would allow B no recovery. But if B had rejected C's offer and had continued (without waiving his contract rights) to work for A at the reduced $3,500 a month level, the majority would presumably allow B to

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[1] I note that the majority does not hold that the strike was illegal. If it were illegal, that would put the issue in a different context.

recover $9,000 from A, as it allows pre-strike recovery here.[2] That seems an unreasonable result which is not consonant with fundamental contract law.

I accordingly dissent from so much of the majority opinion as disallows all recovery for any striking employee during any of the time he or she was on strike.

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[2] If, in the latter situation, the majority limited B's recovery to $6,000 (on the theory that he could have mitigated his otherwise $9,000 damages by accepting C's offer), then the majority could not consistently deny B *all* recovery in the former situation (where he accepts C's offer).

APPENDIX B

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

U. S. Bankruptcy Court
Southern District of Texas
FILED

SEP 10 1985
By /s/_____
Clerk

In re	§	
	§	Case No. 83-04020-H1-5
CONTINENTAL AIR LINES, INC.,	§	(Chapter 11)
	§	
Debtor.	§	
	§	
In re	§	
	§	Case No. 83-04021-H3-5
TEXAS INTERNATIONAL AIRLINES, INC.,	§	(Chapter 11)
	§	
Debtor.	§	Consolidated Case No. 83-04019-H2-5

ORDER GRANTING DEBTORS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

For the reasons set forth in the findings of fact and conclusions of law attached hereto, the Debtors' Motion for Partial Summary Judgment disallowing the claims for contract rejection damages filed by the Air Line Pilots Association, International and the

Union of Flight Attendants on behalf of pilots and flight attendants is hereby granted to the extent such claims include damages for striking pilots and flight attendants during the period of time they were on strike. The amount of such disallowance shall be determined in a hearing at which the identities of striking pilots and flight attendants and the periods of time they were on strike will be determined. In the alternative, in the event that the reference of the Motion for Partial Summary Judgment is withdrawn, the claims by ALPA and UFA for contract rejection damages on behalf of striking pilots and flight attendants are hereby estimated to have zero value. It is so

ORDERED and ADJUDGED this 10th day of September, 1985.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

U. S. Bankruptcy Court
Southern District of Texas
FILED

SEP 10 1985
By /s/
Clerk

In re CONTINENTAL AIR LINES, INC., Debtor.	§	Case No. 83-04020-H1-5 (Chapter 11)
In re TEXAS INTERNATIONAL AIRLINES, INC., Debtor.	§	Case No. 83-04021-H3-5 (Chapter 11) Consolidated Case No. 83-04019-H2-5

UNCONTESTED FACTS AND CONCLUSIONS OF LAW RELATIVE TO DEBTORS'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CONTRACT REJECTION CLAIMS OF STRIKERS

UNCONTESTED FACTS

1. On September 24, 1983, Continental Air Lines, Inc. and Texas International Airlines, Inc. filed petitions for

reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101, et seq. Upon filing the bankruptcy petition, Continental temporarily suspended all domestic service and on September 27, 1983, Continental began rebuilding that service by reinstating a limited portion of its domestic service, initially requiring fewer employees than immediately prior to bankruptcy. The active employees worked under "emergency work rules" and were generally paid lower wages and benefits than they had received before the filing of the petition. [see cites in paragraph 3-6 below].

2. In response to Continental's implementation of the emergency work rules, the Air Line Pilots Association, International ("ALPA") and the Union of Flight Attendants ("UFA") called strikes which began October 1, 1983. The ALPA strike has continued to the present. The UFA strike was terminated on April 17, 1985 when the union instructed its members to offer unconditionally to return to work.

3. Continental filed a Motion To Reject its collective bargaining agreements with ALPA and UFA on September 27, 1983. Following an extended hearing this Court approved Continental's motion to reject its collective bargaining agreements with ALPA (Order of June 19, 1984) and UFA (Order of December 5, 1984). Each contract rejection is retroactive to September 24, 1983.

4. This Court has previously found that "had Continental not made its unilateral changes in pilot pay and work rules, it would have been unable to continue its operations for very much longer for want of necessary cash and, because it could not compete effectively with the low cost carriers in direct competition with it, it would have continued losing money until it closed its doors."

Findings of Fact And Conclusions of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA ¶ 28; see In re Continental Airlines Corp., 38 B.R. 67, 71-72 (Bankr. S.D. Tex. 1984); Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreement at 12-13, 30. The Court also found that "without substantial concessions from [the UFA] contracts, Continental would run out of money and go out of business." Findings of Fact And Conclusions of Law Relating To the Rejection Of Collective Bargaining Agreements with UFA at 8.

5. This Court has further found that the emergency work rules applicable to pilots and flight attendants were modeled on work rules in use at Braniff Airways, Inc. and Southwest Air Lines, and that a substantial proportion of the unionized employees at Continental have indicated, by electing to cross the picket lines, "their willingness to work at the wage levels and under the working conditions (including increased productivity) offered by Continental." Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreements at 47-48; see Findings Of Fact And Conclusions Of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA at ¶¶ 31, 32; Findings Of Fact And Conclusions Of Law Relating To The Rejection Of Collective Bargaining Agreements With UFA at 6-7, 10.

6. This Court's previous findings make clear that the striking pilots retained their status as employees during the time they were on strike. See Memorandum of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreement at 22, 23-24. This Court has also found that upon filing its petitions for reorganization, "Continental immediately went on a campaign to get the remaining pilots to agree to fly under the emergency work

rules," and that once ALPA's October 1, 1983 strike began, "Continental maintained a telephone 'bank' in which pilots were called and requested to fly." Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreements at 22. This Court has further found that Continental "made a strenuous effort to get striking pilots to return to service," and upon "instructions from its chief operating officer, Continental delayed hiring [replacement] pilots until it felt it had to do so to service its re-expanding route system." Id. at 22-23.

7. ALPA and UFA have filed claims in this Court for contract rejection and other damages on behalf of all pre-petition pilots and flight attendants, respectively. Continental has sought summary judgment disallowing the contract rejection damage claims insofar as they seek to recover backpay and other benefits for striking employees during the time they were on strike.

8. The unions have asserted in response that their striking members should not be denied damages because (a) they were not really on strike at all, but rather were simply withholding their services (this position was abandoned at oral argument); (b) federal labor law does not apply to the determination of employee claims in bankruptcy proceedings; and (c) the changes in wages and work rules on September 24, 1983, should be treated as wrongful "constructive" discharges of affected employees.

CONCLUSIONS OF LAW

1. As originally filed on April 30, 1985, Debtors' Motion requested this Court to enter summary judgment in Debtors' favor on the issue of liability for contract rejection damages for strikers, pursuant to Section 502(b)(1).

2. On June 3 and 4, 1985, ALPA and UFA filed motions pursuant to 28 U.S.C. § 157(d) seeking to withdraw the reference of this Motion from the Bankruptcy Court on grounds that Debtors' Motion "required the consideration of federal laws regulating interstate commerce," i.e., the Railway Labor Act, 45 U.S.C. § 151 et seq., and that withdrawal of the reference was therefore mandatory. The unions' motions remain pending in the District Court.

3. On June 3, 1985, ALPA and UFA, joined by the Official Union Labor and Pension Creditors' Committee, filed a Motion to Stay this Court's consideration of the present motion pending District Court disposition of the Section 157(d) Motion to Withdraw Reference. After hearing, this Court entered an Order denying the Motion, filed July 8, 1985, which found, inter alia, as follows:

> To interpret Section 157(d) as the unions propose would disrupt the claims procedure so carefully crafted in the Bankruptcy Code, by bifurcating the claims resolution process between the District Court and the Bankruptcy Court. As a practical matter, such a result would be intolerable. Not only would the Bankruptcy Court be abandoning a statutorily-charged responsibility, but it would be thrusting upon the District Court additional litigation in an already overcrowded arena, a scenario that is not only costly and time consuming, but also a ridiculously circuitous route in the bankruptcy case administration process.

Order filed July 8, 1985 at 4-5.

4. Subsequently, on July 16, 1985, Debtors filed a Motion to Estimate All Contingent Or Unliquidated Employee Claims For

Purposes Of Confirmation Pursuant To Bankruptcy Code Section 502(c) And To Convert Pending Motions For Summary Judgment To Motions To Estimate The Value Of Claims. While Debtors' position denying all liability for such claims had not and has not changed, Debtors' proposed procedures changed, according to the Debtors' view, only the estimation process could produce allowance of claims for Plan purposes in a time frame sufficient to avoid delay in the closing of this case.

5. On June 25, 1985, this Court entered an Order Granting Debtors' Motion for Extension of the Exclusivity Period up to September 5, 1985 upon the express condition that no further extensions would be granted and that the Debtors would, in fact, file a proposed Plan of Reorganization on that date.

6. The Court is satisfied that it has jurisdiction to resolve on the merits the liability issues presented by the present motion, for the motion does not require direct interpretation or application of the statutory language of the Railway Labor Act or any other federal statute regulating interstate commerce. The question rests squarely in the bankruptcy claims adjudication process.

7. There are on file in this major reorganization proceeding at least three other § 157(d) motions to withdraw the reference which have been pending undecided on the crowded docket of the District Court for this district for over one year. See Motion Of Union Of Flight Attendants For Withdrawal Of The Reference Of Debtors' Motion To Reject Collective Bargaining Agreement Under The Railway Labor Act, filed September 7th, 1984; Motion Of Air Line Pilots Association For Withdrawal Of The Reference Of Debtors' Motion To Reject Collective Bargaining Agreement Under The Railway Labor Act, filed August 3, 1984; Motion By International Association Of

Machinists And Aerospace Workers To Withdraw The Reference To The Bankruptcy Court Of The Debtors' Motion To Reject Collective Bargaining Agreements, filed July 20, 1984. The pendency of the § 157(d) motions and the novel and arcane nature of the issues arising from this recently enacted provision could create substantial potential difficulties in the administration of this bankruptcy case and to the bankruptcy system in general. In the opinion of this Court, it is for this reason that those courts which have considered this issue have held that § 157(d) must be narrowly construed to avoid disrupting the Bankruptcy Court system constructed by the Bankruptcy Reform Act of 1978.

While this Court has concluded that it has jurisdiction to enter summary judgment on liability on the present motion, the questions raised regarding the applicability of § 157(d) to this motion for summary judgment, as well as the pendency in the District Court of the unions' motions to withdraw reference, have the potential for substantially delaying the closing of this reorganization. For this reason, the Court has determined that it will also estimate the value of the claims subject to this Motion pursuant to § 502(c) of the Bankruptcy Code. Since estimation is clearly a "core proceeding" and a function within the jurisdiction of the Bankruptcy Court, use of the estimation procedure by this Court will allow the now on file Debtors' Reorganization Plan to proceed without unnecessary or cost delay to the Debtor or creditor groups who may have reached agreement relative to debt repayment. The estimation procedure can, however, be simplified by resolution of the summary judgment issues now on file by the Court's review of facts previously established in the case and application of the appropriate law.

8. Section 502(b)(1), 11 U.S.C. § 502(b)(1), provides that a claim against an estate in bankruptcy is to be disallowed if such

claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." The value of a bankruptcy claim for contract breach must therefore be determined in precisely the same way that such a claim would be determined if the bankruptcy had not occurred. In re Nuisance Corp., 17 Bankr. 80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy ¶ 502.02, at 502-24 et seq. (15th ed. 1985). A bankrupt in breach of contract pursuant to 11 U.S.C. § 365(g) may assert any defense to the liability flowing from statutorily created breach which any other promisor in breach of contract may assert. Mazirow v. Grigsby (In re White Motor Corp.), 44 Bankr. 563 (N.D. Ohio 1984).

9. The Bankruptcy Court must determine the allowability of claims by applying the appropriate substantive law which would be applied in the non-bankruptcy context. See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 n.8 (5th Cir. 1981); Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946).

10. The rejected contracts were entered into pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., as expressly stated at the outset of each contract. A Railway Labor Act contract, "like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by the federal law, in the federal courts." IAM v. Central Airlines, Inc., 372 U.S. 682, 692 (1963). The Supreme Court has also held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers of America v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957).

11. Under well-established principles of federal labor law, striking employees are not entitled to back pay for the period of time they are on strike, even if the strike is in response to an unlawful unfair labor practice by the employer. See, e.g., Safeway Trails, Inc., 233 N.L.R.B. 1078, 1083 (1977), enf'd, 641 F.2d 930 (D.C. Cir. 1979), cert. denied, 444 U.S. 1072 (1980); Ace Tank & Heater Co., 167 N.L.R.B. 663, 664 (1967); Comfort, Inc., 152 N.L.R.B. 1074, 1090 (1965), enf'd in part, 365 F.2d 867 (8th Cir. 1966). The basis for this principle that the employee's voluntary act of going on strike is an intervening cause of his loss, for which the employer is not legally answerable because alternative legal remedies were available to the employee.

> An employer is . . . only indirectly responsible for the loss of employment suffered by a striker even when the strike has been precipitated by unfair labor practices. The loss of employment is attributable to the striker's own voluntary act in withholding his services until the unfair labor practices have been remedied by the strike rather than by available forms of legal redress. It is for this reason that a striker — even an unfair labor practice striker — unlike a discriminatee, is not entitled to backpay until he has made an application for reinstatement which has been denied.
>
> For the same reason it would seem that a striker is not entitled to be made whole for the loss of any benefits which he may have incurred as a result of going out on strike.

Cone Bros. Contracting Co., 158 N.L.R.B. 186, 197 (1966). These principles are equally applicable under the Railway Labor Act. Empresa Ecuatoriana de Aviacion v. Dist. Lodge No. 100, 690 F.2d 838, 847 (11th Cir. 1982), cert. dismissed, 104 S. Ct. 40

(1983); National Airlines, Inc. v. IAM, 416 F.2d 998, 1097 (5th Cir. 1969), after remand, 430 F.2d 957, 961 (5th Cir. 1970).

12. Application of federal labor law to claims arising under RLA contracts may not be avoided by labeling a breach of contract claim as a "wrongful discharge." Andrews v. Louisville & N. R. Co., 406 U.S. 320, 323-34 (1972); see also Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 192 (9th Cir. 1983); cf. Allis Chalmers v. Lueck, 105 S. Ct. 1904, 1910-11 (1985). Federal labor law therefore controls the determination of remedies for breach of these RLA collective bargaining agreements.

13. The attempt to characterize the changes in pay rates and work rules on September 24, 1983 as a wrongful "constructive" discharge fails in any event because none of the prerequisites to a finding of wrongful constructive discharge can be met. A constructive discharge is an imputed, rather than an actual, discharge; it may be imputed by law where an employer acts to make conditions intolerable with the intent and effect of forcing the employee to quit. In order to find that the changes in rates of pay and working conditions implemented on September 24, 1983 constituted a wrongful constructive discharge en masse, a court would have to conclude (1) that the pilots and flight attendants actually terminated their employment as a result of those changes; (2) that Continental acted without business justification and with anti-union animus in making the changes; (3) that the changes created by the emergency work rules were intolerable; and (4) that the changes were in some way unlawful and "wrongful," i.e., they must violate a legal duty owed by the employer to the employee, such as the duty not to discriminate on the basis of union membership. See NLRB v. Cable Vision, Inc., 660 F.2d 1 (1st Cir. 1981); J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972); Newspaper Guild of Boston v. Boston

Herald-Traveler Corp., 238 F.2d 471, 472 (1st Cir. 1956); Guardian Ambulance Serv., 228 N.L.R.B. 1127, 1130 (1977); Highland Avenue Convalescent Home, Inc., 220 N.L.R.B. 998 (1975).

14. There is no evidence per the previous Findings of the Court that the events of September 14, 1983 included mass termination, either actual or constructive of pilots or flight attendants. The unions do not claim that their members were actually involuntarily discharged on September 24, 1983, nor do they claim that the strikers voluntarily terminated their employment. This Court's previous finding that Continental began strenuous efforts to get the pilots to return to work immediately after filing its bankruptcy petitions further refutes the constructive discharge claim.

15. Continental did not lack a business justification for the changes in wages and work rules. This Court has already expressly found compelling business justifications for Continental's actions, and has rejected a claim by these unions that Continental acted in bad faith in implementing new work rules on September 24.

16. The changes in wages, work rules and working conditions for Continental pilots and flight attendants on September 24, 1983 were not legally "wrongful" because they were approved as legal and proper by this Court's June 19, 1984 and December 5, 1984 decisions allowing the rejection of the collective bargaining agreements with ALPA and UFA, respectively. In accordance with NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984), this Court held that the changes in wage rates and work rules implemented by Continental on September 24, 1983 "were accomplished not by the employer's unilateral action, but rather by operation of law." Memorandum of Authorities Authorizing

Rejection of ALPA Collective Bargaining Agreement at 35 (emphasis in original). The Bankruptcy Court also rejected the unions' claim that the implementation of wage rates and work rules that differed substantially from those in the collective bargaining agreements would violate the status quo provision of the Railway Labor Act, 45 U.S.C. § 156. See Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreements at 30-31. The Bankruptcy Court held that "the rationale of the Supreme Court in Bildisco is equally applicable to the Railway Labor Act and the status quo provisions of that Act must give way to the realities of bankruptcy." Memorandum of Authorities at 37-38. Thus, in accord with the Supreme Court's ruling in Bildisco, this Court expressly held that the rejection of Continental's labor agreements and the changes in wages and work rules implemented on September 24, 1983 did not violate the Railway Labor Act. Memorandum of Authorities at 38-39.

17. This Court's prior decisions approving rejection are the law of this case and as such are binding on the unions, and cannot be collaterally attacked in this claims proceeding. See Arizona v. California, 460 U.S. 605, 618 (1983); Messenger v. Anderson, 225 U.S. 436 (1912); White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967).

18. The contention that the denial of contract rejection damages to strikers would unlawfully discriminate against them vis-a-vis non-strikers must also be rejected. "The axiom that an employer need not remunerate strikers for work not performed means simply that it is no more discriminatory for an employer to deny compensation for absence due to strike than to deny it for any other period of absence." Kimberly-Clark Corp., 171 N.L.R.B. 614, 621 (1968). An award of contract rejection

damages to employees striking a bankrupt company would grant them a windfall not enjoyed by employees striking a solvent company, a completely anomalous result.

19. The contention that the contract rejection claims of striking employees are "minor disputes" which must be resolved through binding arbitration before an adjustment board lacks merit for two reasons. First, a Bankruptcy Court has not only jurisdiction, but also responsibility to decide all claims against an estate. 28 U.S.C. §§ 1334(a), 157(a), (b)(1), (b)(2)(B). A determination whether to let a particular dispute be decided in another forum is committed to the Bankruptcy Court's absolute discretion. See, e.g., Zimmerman v. Continental Air Lines, Inc., 712 F.2d 55 (3d Cir. 1983), cert. denied, 104 S. Ct. 699 (1984); In re F&T Contractors, Inc., 649 F.2d 1229 (6th Cir. 1984). Second, a Bankruptcy Court's exercise of discretion is to be guided by whether in the circumstances of a particular case a specialized tribunal might provide a more efficacious means of resolving a dispute. See, e.g., In re Brookhaven Textiles, Inc., 21 B.R. 204, 207 (Bankr. S.D.N.Y. 1982). The question of strikers' entitlement to contract rejection damages is a question of law which presents no need for either a specialized tribunal or particularized expertise, inasmuch as the breach of contract is already established and the sole issue is whether strikers are entitled to damages under federal labor law. See In re Muskegon Motor Specialties Company, 313 F.2d 841, 843 (6th Cir. 1963).

20. This motion presents a pure issue of law — whether strikers are entitled to damages for lost future wages and fringe benefits for the time periods in which they withheld their services from the Debtors. To decide this motion, this Court need not decide any factual issues — such as who precisely was on strike and when; whether the strikers failed to mitigate damages; how

many employees were on strike; or the total amount by which the claims would be reduced if the Debtors prevailed on this motion.

21. No affidavits or other admissible evidence have been offered to establish that there is a genuine dispute as to any material fact. Because this Court is persuaded that Continental is entitled to judgment as a matter of law, partial summary judgment is appropriate and will be granted. See Fed. R. Civ. P. 56(e).

22. For the foregoing reasons, the union claims for contract rejection damages will be disallowed to the extent they seek damages for striking employees for any period of time during which the employees on whose behalf the claims were asserted were on strike. At an evidentiary hearing to be held on the claims, the Court can proceed to determine the amount by which the unions, claims should be reduced due to their strikes against Continental.

23. This Court has previously held, and reaffirms here, that it does not believe that Continental's motion for partial summary judgment presents issues whose resolution requires the consideration of federal laws regulating activities affecting interstate commerce within the meaning of 28 U.S.C. § 157(d). The Court here interprets the phrase "federal Laws" to mean "federal statutes". Although Continental's objections to the unions' claims at issue herein can in some respects be said to arise out of federal labor law, the resolution of Continental's motion has not required the interpretation of any federal statute or the balancing of competing federal policies. Recognizing, however, that the unions have filed motions to withdraw the reference of Continental's motion from the Bankruptcy Court, this Court in the interest of efficiency and economy to the Court as well as the parties hereby rules in the alternative that the value of the unions'

claims for contract rejection damages on behalf of striking employees for the period of time they were on strike is estimated pursuant to 11 U.S.C. § 502(c) to be zero.

The above findings and conclusions are hereby made a part of and incorporated in the attached Order Granting the Motion for Summary Judgment. It is so

ORDERED and ADJUDGED this 10th day of September, 1985.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

CONTINENTAL AIRLINES CORPORATION,	83-04019-H2-5
CONTINENTAL AIR LINES, INC.	83-04020-H1-5
TEXAS INTERNATIONAL AIRLINES, INC.,	83-04021-H3-5
TXIA HOLDINGS CORPORATION,	83-04022-H3-5
	Consolidated Case No. 83-04019-H2-5

Debtors

ORDER

For the reasons set forth in the findings of fact and conclusions of law attached hereto, the motion of Debtors for summary judgment disallowing the Union of Flight Attendants claims for contract rejection damages is hereby granted. In the alternative, such claims for contract rejection damages are hereby estimated to have zero value. It is

ORDERED AND ADJUDGED this the 8th day of May, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

CONTINENTAL AIRLINES CORPORATION,	83-04019-H2-5
CONTINENTAL AIR LINES, INC.	83-04020-H1-5
TEXAS INTERNATIONAL AIRLINES, INC.,	83-04021-H3-5
TXIA HOLDINGS CORPORATION,	83-04022-H3-5
	Consolidated Case No. 83-04019-H2-5

Debtors

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE UNION OF FLIGHT ATTENDANTS CLAIMS FOR CONTRACT REJECTION DAMAGES

The following facts are either stipulated, uncontested or established by the evidentiary record in this case in previous matters, of which the Court takes notice and is considered a proper and adequate basis on which to make these Findings and Conclusions:

FINDINGS OF FACT

1. On September 24, 1983, Continental Airlines, Inc. and Texas International Airlines, Inc. (hereinafter "Continental") filed petitions for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101, et seq.

2. Thereafter, Continental filed a motion pursuant to § 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a), to reject (a)

the collective bargaining agreement between Continental and the Union of Flight Attendants. After an extended evidentiary hearing, the Court, on December 5, 1984 entered its order rejecting two collective bargaining agreements between the Debtors and the Union of Flight Attendants ("UFA") that had been in effect on the day Debtors filed their bankruptcy petitions. Order Allowing Rejection of Collective Bargaining Agreements (Dec. 5, 1984). On April 30, 1985, UFA filed a proof of claim for $409,190,273.00 in contract rejection damages, including damages for lost future wages and benefits in the amount of approximately $299,140,000.

3. By their terms, the UFA contracts were to expire on October 1, 1983 (as to the Debtors' DC-9 flight attendants) and on December 1, 1984 (as to the Debtors' Boeing 727 and DC-10 flight attendants). The latter contract included provisions which permitted reopening of the contract prior to the expiration date in the event of certain government actions regarding deregulation or the acquisition of new types of aircraft. Debtors take the position that the Boeing 727 and DC-10 contract was properly reopened by virtue of a February 4, 1983 letter from Continental to UFA requesting negotiations under the authority of these provisions. The DC-9 contract was reopened in August 1983.

4. In its proof of claim, UFA claimed lost future wages and benefits as contract rejection damages for the period September 24, 1983 through and including May 31, 1986, as to both UFA contracts. The Union Committee asserts that these employee claims for damages are the difference between what they would have earned had they continued to work under the contract and what they in fact earned.

5. On September 20, 1985, Continental (hereinafter Debtors) filed a Motion to Estimate the Vale of the UFA Claims for Contract Rejection Damages at Zero Value and for Summary Judgment disallowing these claims in their entirety. UFA and the Union Committee strongly opposes both motions.

6. The UFA contracts relative to the motion here are in evidence in the record described above of which this Court has taken notice. These contracts are clear and unambiguous. It appears that: (a) They do not contain any guarantee of employment; (b) Each contract contains terms as to the wages and working conditions which will be provided to employees covered by the agreements when work is available; and (c) Each contract provides that, when work is not available, management may furlough employees, subject to notice of furlough and furlough pay requirements, which themselves are subject to exceptions for various contingencies not within management's control.

7. At the time of the filing of the bankruptcy petitions in this matter, the Debtors unilaterally modified work rules and reduced wages and fringe benefits paid to flight attendants represented by UFA as well as those of pilots and other employees, pending this Court's approval of the Debtors' motion to reject the contracts under 11 U.S.C. § 365. In re Continental Airlines Corp., 38 Bankr. 67 (Bankr. S.D. Tex. 1984). This Court approved the rejection of the flight attendant contracts, effective retroactively to September 24, 1983, in accordance with 11 U.S.C. § 502(g). This Court has already found that if Debtors had not made changes in their labor contracts, including specifically the UFA contracts, within a short time the Debtors would have run out of cash and gone out of business. Findings of Fact and Conclusion of Law Relating To The Rejection of Collective Bargaining Agreements

With UFA (December 5, 1984) at 8; Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association Collective Bargaining Agreements (August 17, 1984) at 33; Findings of Fact and Conclusions of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA (August 17, 1984) at ¶¶ 28, 40.

CONCLUSIONS OF LAW

1. The unions contend that this Court, which rejected the ALPA and UFA collective bargaining agreements pursuant to the Bankruptcy Code itself, 11 U.S.C. § 365, now does not have jurisdiction to liquidate the claim or to estimate the value of any damages created thereby through the Bankruptcy Code "breach" of these contracts. 11 U.S.C. § 365(g). This contention is clearly without merit. Bankruptcy courts have jurisdiction to decide the allowability of all claims against an estate. 28 U.S.C. §§ 1334(a); 157(a), (b)(1), (b)(2)(B).

2. The Court has jurisdiction to resolve on the merits the question of liability, if any, and damage claims for contract rejection presented by the present motion. The motion does not require direct interpretation or application of the statutory language of Federal Labor Statute or any other federal statutes regulating any interstate commerce, and therefore § 152(d) is inapplicable here. The question rests squarely in the bankruptcy claims adjudication process. 11 U.S.C. § 502. In re Continental Air Lines, Inc., Order Granting Debtors' Motion to Estimate, 57 B.R. 841 (S.D. Tex. 1985).

3. Further, use of the estimation procedure by this Court will allow the Debtors' reorganization plan to proceed without unnecessary or costly delay to the Debtor or other creditor groups

who may have reached agreement relative to debt repayment. The estimation procedure can, however, be simplified by resolution of the summary judgment issues now on file by the Court's review of undisputed facts and facts previously established in the case, and application of the appropriate law.

4. The courts have recognized that bankruptcy judges have discretion to determine the allowability of claims in bankruptcy even if the claim ordinarily would have been liquidated by another tribunal. Of course, in the absence of bankruptcy, every claim would have been resolved in another forum. In Zimmerman v. Continental Air Lines, Inc., 712 F.2d 55, 56 (3d Cir. 1983), cert. denied, 104 S.Ct. 699 (1984), a manufacturing company entered into a contract with Continental which contained an arbitration clause. The Arbitration Act, 9 U.S.C. §§ 1-208, "requires a federal court to stay proceedings pending arbitration if issues pertinent to the dispute are also the subject of an arbitration agreement between the parties." 712 F.2d at 56. Subsequently, the manufacturing company went into bankruptcy and initiated adversary proceedings against Continental alleging that Continental's claim under the contract was improper. Under the authority of the Arbitration Act, Continental requested that the matter be deferred to arbitration.

The bankruptcy court there denied Continental's request, the Third Circuit affirmed, and the Supreme Court denied certiorari. Relying on the policies underlying the 1978 Bankruptcy Reform Act, the Third Circuit held that the Act impliedly modified the express provisions of the Arbitration Act. 712 F.2d at 56, 59.

> Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial

> activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. See 28 U.S.C. § 1334. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance. Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the Bankruptcy Court.

712 F.2d at 59-60 (emphasis supplied).

5. Citing Gary Aircraft Corp. v. United States (In re Gary Aircraft Corp.), 698 F.2d 775 (5th Cir.), cert. denied, 104 S.Ct. 82 (1983), the unions further argue that bankruptcy courts lack jurisdiction to disallow claims in disputes that Congress has committed to a specialized tribunal. The unions' reliance on Gary Aircraft is misplaced. Gary merely established that, under the 1898 Act, bankruptcy courts ordinarily should defer to the Armed Services Board of Contract Appeals ("ASBCA") for the liquidation of claims arising from government defense contracts. (The Gary case factually originated with Gary filing a claim under its contract against the government, with the government filing a counter claim.) The case does not provide that bankruptcy courts have no "jurisdiction" over such claims. Moreover, the Fifth Circuit based its decision on its findings that deferral would not impair the satisfaction of other bankruptcy claims and that government contracts are extremely complex, technical and esoteric, 698 F.2d at 782, not on the proposition that every claim

in bankruptcy which otherwise would have been decided by a "specialized tribunal" should be liquidated by that tribunal.

To the contrary, the Fifth Circuit expressly acknowledged that, where bankruptcy court estimation or liquidation by the ASBCA would unduly delay the administration of the estate, the bankruptcy court retains the power under the 1898 Act to disallow the claim in its entirety. 698 F.2d at 784 n.7. Under the 1978 Bankruptcy code, which applies to this proceeding, the authority of a bankruptcy court to estimate the value of unliquidated claims is, if anything, even stronger, since new 11 U.S.C. § 502(c) requires the court to estimate the value of unliquidated claims where liquidation would unduly delay reorganization.[1] The 1978 Act significantly expanded bankruptcy subject matter jurisdiction:

> [The 1978 Act] evidenced a strong Congressional or federal policy in favor of the newly created bankruptcy court having jurisdiction which is sufficiently broad to promptly and expeditiously hear and determine all controversies involving matters of law, equity and even admiralty.

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[1] See Addison v. Langston (In re Brints Cotton Marketing, Inc.), 737 F.2d 1338, 1340-41 (5th Cir. 1984); In re Curtis, 40 Bankr. 793, 801 n.7 (W.D. La. 1984); In re Nova Real Estate Investment Trust, 23 Bankr. 62, 65 (Bankr. E.D. Va. 1982); In re Brada Miller Freight Systems, Inc., 8 Bankr. 62 (Bankr. N.D. Ala. 1980); 3 Collier on Bankruptcy ¶ 502.03 at 502-74, 75 (15th ed. 1985). Accordingly, even if this Court did not have jurisdiction to disallow the claim, it is clear that the Court nevertheless would have jurisdiction to estimate the value of the contract rejection claims. Order Granting Debtors' Motion to Estimate All Contingent Unliquidated Employee Claims For Purposes of Chapter 11 Confirmation Pursuant to Section 502(c) of the Bankruptcy Code (Sept. 26, 1985). Thus, for example, courts may estimate the value of claims asserted on behalf of employees by the NLRB, without deferring to any NLRB administrative process, which might otherwise apply. In re Unit Parts Co., 9 Bankr. 386 (W.D. Okl. 1981) (court rejects the same arguments and authorities presented by the unions here, refusing to defer to NLRB, noting that these authorities predate the 1978 expansion of bankruptcy court jurisdiction).

In re Cross Electric Co., 9 Bankr. 408, 410 (Bankr. W.D. Va. 1981); see Zimmerman v. Continental Airlines, Inc., supra, 712 F.2d at 56.

6. In addition, the Debtors' motion for summary judgment and estimation in this claims proceeding presents a very different case for bankruptcy court resolution of the issues than was present in Gary. First, unlike Gary, the time necessary to complete arbitration of the unions' multi-million dollar contract rejection claims could seriously impair the claims and interests of the substantial body of other creditors who have already settled with the debtors and now await distribution. As pointed out in another case, in Gary, "the only asset of the bankrupt's estate . . . consisted of a . . . contractual claim against the United States government." In re Compton Corp., 40 Bankr. 880, 884 (Bankr. N.D. Tex. 1984). Where resolution of a claim could "affect the amount, existence and priority of claims to be paid out of the general funds, and, thus involve the interest of other creditors," courts have held that a bankruptcy judge does not abuse his discretion in refusing to compel arbitration of such a claim. In re F&T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981); see Johnson v England, 356 F.2d 44, 51-52 (9th Cir.), cert. denied, 384 U.S. 961 (1966). Moreover, since "[p]rotection of general creditors is a major function of . . . bankruptcy proceedings," submission of the union claims to arbitration would be particularly unsound because Continental's creditors have not consented to arbitration and would have no right to participate in the arbitration process. 649 F.2d at 1233 n.1; 356 F.2d at 52.[2]

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[2] In addition, in arbitration there would be no right to discovery, arbitrators are less likely to follow legal standards than courts, and judicial review would be limited. See Zimmerman, Cross and Johnson, supra.

Second, unlike the ASBCA in Gary, RLA arbitration panels (system boards of adjustment) are not specialized tribunals with particular expertise in the specific issues of fact that must be resolved in order to value the claim as it relates to this proceeding. If presented to a system board, bankruptcy contract rejection claims would be decided by arbitrators who would not necessarily be more familiar with the particular contract language or past practice of the parties than is this Court, and who may, like this Court, have to take evidence and hear testimony in order to resolve any actual issues of fact, if any exist. Unlike the Court, however, the arbitrators would have no cognizance of the reorganization or the interests of other creditors. Particularly, in these circumstances, deferral to arbitration is not required. See In re Amalgamated Foods, Inc., 41 Bankr. 616, 617, 619 (Bankr. C.D. Cal. 1984) (debtor need not submit ERISA claims to arbitration since bankruptcy claims process adequate to resolve claims).

Third, Gary was decided under the 1898 Act. Bankruptcy courts which have considered Gary generally have found it inappropriate to defer claims to another forum in cases under the 1978 Code. For example, in Amalgamated Foods, the court refused to defer a claim under the Employee Retirement Income Security Act ("ERISA") to arbitration even though the statute contains a mandatory arbitration procedure. Distinguishing Gary and Nathanson v. NLRB, 344 U.S. 25 (1952), the court rejected the creditor's contention that the claim required expertise not possessed by the court. 41 Bankr. at 618-619. Comparing the bankruptcy claims process under the 1978 Bankruptcy Reform Act to ERISA's statutory arbitration procedure, the court concluded that both procedures furthered the policy of speedy disposition.

> I find that the bankruptcy claims procedure achieves the goal sought by ERISA arbitration —indeed, that the claims procedure may serve that goal better than ERISA arbitration itself. For that reason, I hold that the debtor may bypass arbitration in favor of the claims procedure.

41 Bankr. at 616-617. See also In re Page-Wilson Corp., 37 Bankr. 527, 529 (Bankr. D. Conn. 1984); In re Compton Corp., supra, 40 Bankr. at 884.

These cases are undoubtedly correct, since the Bankruptcy Reform Act of 1978:

> [S]ignificantly expands the jurisdiction of the bankruptcy courts and is based on the notion that to protect the positions of both the bankrupt and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such action should be resolved in one expeditious proceeding.

Zimmerman v. Continental Air Lines, supra, 712 F.2d at 56 (emphasis supplied).[3]

7. Finally, and most conclusively, as UFA itself points out in its opposition, at 6, in NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984), the Supreme Court said that claims for damages arising out of the bankruptcy court's own rejection of a collective

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[3] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, did not detract from bankruptcy court subject matter jurisdiction, but merely allocated the exercise of that jurisdiction between the bankruptcy and district courts. 28 U.S.C. § 1334; 1 Collier on Bankruptcy ¶ 3.01 at 3-19 to 3-29 (15th ed. 1985); Carlton v. BAWW, Inc., 751 F.2d 781 (5th Cir. 1985).

bargaining agreement must be adjudicated in the bankruptcy court.

> [C]laims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. See 11 U.S.C. § 502 (g); In re Hoe & Co., Inc., 508 F.2d 1126, 1132 (2d Cir. 1974); Workman v. Harrison, 282 F.2d 693, 699 (10th Cir. 1960). Thus, suit may not be brought against the debtor-inpossession under the collective bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.

104 S. Ct. at 1198-99 (emphasis supplied). Thus, Gary presents no obstacle to the resolution of this Court of the Claims issues, and the unions' jurisdictional objections are totally without merit.

8. Although the rejection of an executory contract constitutes a breach of that contract, 11 U.S.C. § 365(g), Section 502(b)(1) of the Bankruptcy Code, 11 U.S.C. § 502(b)(1), provides that a claim against an estate in bankruptcy is to be disallowed if such claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." The legal standards for measuring the value of a bankruptcy claim for contract breach are therefore the same as those which would be applied if the bankruptcy had not occurred. In re Nuisance Corp., 17 Bankr. 80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy ¶ 502.02 at 502-24 et seq. (15th ed. 1985). A bankrupt in breach of contract pursuant to 11 U.S.C. § 365 may assert any defense to the liability flowing from the statutorily created breach which any other promisor in breach of contract

may assert. Mazirow v. Grigsby (In re White Motor Corp.), 44 Bankr. 563 (N.D. Ohio 1984).

9. The Court must therefore determine the allowability of these claims by applying the appropriate substantive law which would have been applied in the non-bankruptcy context. See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 n.8 (5th Cir. 1981); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161 (1946).

10. The rejected contracts were entered into pursuant to the Railway Labor Act, 45 U.S.C. §§ 151, et seq., as expressly stated at the outset of each contract. A Railway Labor Act contract, "like the Labor-Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." IAM v. Central Airlines, Inc., 372 U.S. 682, 692 (1963). The Supreme Court has also held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957). Although the Debtors are subject to the Railway Labor Act, the federal courts have often looked to decisions interpreting the National Labor Relations Act, including § 301 of the LMRA amendments to that Act, for guidance in RLA matters. See generally Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (although NLRA cannot be imported wholesale into the railway labor area, NLRA case law provides "the most relevant corpus of national labor policy"); Japan Airlines Co. v. IAM, 538 F.2d 46 (2d Cir. 1976) (using NLRA Supreme Court decisions to delineate scope of mandatory subjects of bargaining under the RLA).

11. As a matter of federal labor case law, employees subject to a collective bargaining agreement are not entitled to lost future wages as damages under such an agreement when the employer ceases operations, unless the agreement guarantees future employment. See, e.g., J.I. Case v. NLRB, 321 U.S. 332 (1943); Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (6th Cir. 1963); American Bakery & Confectionery Workers v. Great Atlantic & Pacific Tea Co., 357 F. Supp. 1322 (W.D. Pa. 1973), aff'd mem., 491 F.2d 748 (3d Cir. 1974); Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290 (S.D. Ohio 1983), aff'd mem., 738 F.2d 438 (6th Cir. 1984); Union de Trabajadores v. Helio San Jeronimo Corp., 434 F. Supp. 643 (D.P.R. 1977); Hotel & Restaurant Employees Alliance, Local 237 v. Alleghney Hotel Co., 374 F. Supp. 1259 (W.D. Pa. 1974). As noted above, the contracts at issue did not guarantee employment, but only provided the terms and conditions applicable to available work. The presence of contract provisions which permitted management to furlough employees appears to confirm that by their own terms these contracts were on their face not guarantees of employment.

12. As a matter of federal labor case law under both the NLRA and the RLA, and as a matter of the common law of contracts in general, no promisee is entitled to more than nominal damages for breach of contract unless that promisee can demonstrate actual injury proximately caused by the breach. IBEW v. A-1 Electrical Services, 535 F.2d 1, 3 (10th Cir.) cert. denied, 429 U.S. 832 (1976); Brotherhood of R.R. Trainmen v. Denver & R.G.W.R. Co., 338 F.2d 407 (10th Cir. 1964), cert. denied, 380 U.S. 972 (1965); Restatement (Second) of Contracts §§ 346-347.

13. As noted above, but for the rejection of the collective bargaining agreements, the Debtors would have ceased operations and flight attendants would have had no cognizable claims for lost future wages because the rejected contracts did not obligate the Debtors to provide employment, but rather only established rates of pay and working conditions for any employment which was available. Federal labor law does not require an award of damages for time periods during which no work would have been available in any event, even where an employee was discharged in violation of the NLRA. See NLRB v. Biscayne Television Corp., 337 F.2d 267, 268 (5th Cir. 1964); Nabors v. NLRB, 323 F.2d 686, 690 (5th Cir. 1964); Midland Ross, Inc., 239 N.L.R.B. 1205 (1979), order enf'd, 653 F.2d 239 (6th Cir. 1981); NLRB v. United Contractors, Inc., 614 F.2d 134, 138 (7th Cir. 1980); NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1393 (8th Cir. 1974); NLRB v. American Creosoting Co., 139 F.2d 193 (6th Cir. 1943); Brown & Root, Inc., 112 N.L.R.B. 295 (1955); Lauren Burt, Inc. of Colorado, 114 N.L.R.B 295 (1955); Hill Transportation Co., 102 N.L.R.B. 1015 (1953). Under the facts of this case, but for the Court's rejection of the collective bargaining agreements at issue here, the Debtors would have gone out of business and flight attendants represented by UFA could not have claimed lost future wages as damages, because the agreements did not guarantee future employment.

14. Even if UFA's claim for damages are meritorious, UFA damage calculations are flawed. The amount of damages to be awarded for breach of a collective bargaining agreement is limited by both the termination date of the agreement at issue and by the application of 11 U.S.C. § 502(b)(7). The termination date of the contract establishes the ending date for damage calculation purposes.

> The fact that the contract which was breached was due to expire April 30, 1976, is controlling as to the period for which damages may be awarded. Nothing in that contract could have created an expectation that the employees would have continued to enjoy the same wages and benefits beyond the expiration of the contract.

IBT v. Standard Brands, 579 F.2d 1282, 1295 (5th Cir. 1978), cert. denied, 443 U.S. 913 (1979). Accord, UAW v. Roblin Industries, 561 F. Supp. 288, 298 (W.D. Mich. 1983) (rights under agreements can extend beyond expiration date only if agreement so provides); Sun Oil Co. of Pa. v. NLRB, 576 F.2d 553, 558 (3d Cir. 1978); Baker v. Fleet Maintenance, Inc., 409 F.2d 551, 554 (7th Cir. 1969); In re Vic Snyder, Inc., 23 Bankr. 185 (E.D. Pa. 1982). As previously noted, the UFA contracts expired by their own terms on October 1, 1983 (as to DC-9 flight attendants) and December 1, 1984 (as to Boeing 727 and DC-10 flight attendants). UFA's use of May 31, 1986 as the ending date for both contracts in its calculations is based upon its assertions regarding the "average" length of negotiations in the airline industry. These assertions, however, are unsupported by any requisite evidence or appropriate pleading and have not been shown by UFA to bear any relationship here to the "average" length of negotiations at Continental and Texas International Airlines, as the UFA's own witnesses admitted in depositions regarding their calculations. Deposition of C. Lampe at 30-31 (Aug. 14, 1985); Deposition of C. Winkler at 32-33 (Aug. 14, 1985). This is the only evidence before this Court. It appears uncontradicted and was offered by the Debtors. The assertions, the Court concludes, bear no relationship at all to what, in fact, would have happened to Continental, which was not in "average" financial condition, if the contracts had not been rejected.

15. Continental's obligation, under the Railway Labor Act, to maintain the "status quo" after the contracts expired is excused by the Bankruptcy Code. NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984) (despite statutory obligation to maintain wages and working conditions provided for in collective bargaining agreement, Chapter 11 debtors may unilaterally lower wages prior to order rejecting the agreement); Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association on Collective Bargaining Agreements (August 17, 1984) at 30-40.

16. An addition to the restriction on damages created by the term of the contract, Section 502(b)(7), 11 U.S.C. § 502(b)(7), further limits damages for breach of "employment contracts" to a maximum of one year's compensation. Collective bargaining agreements are "employment contracts" within the meaning of 11 U.S.C. § 502(b)(7). In re Cortland Container Corp., 30 Bankr. 715 (Bankr. N.D. Ohio 1983).

17. UFA's reliance on the Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 (1973), to argue that Section 502(b)(7) does not apply to collective bargaining agreements is patently unpersuasive. In that Report, a commission (not the U.S. Congress) described a provision similar to what became Section 502(b)(7) as "principally" (not exclusively) intended to apply to long-term management contracts, and to the termination of contracts for future "athletic, entertainment or other services." The language under discussion itself indicates that the commission did not intend the cap provision to apply only to such contracts. Moreover, the report in question is not part of the legislative history of the 1978 Bankruptcy Code at all, but is a report of a national commission on bankruptcy which concluded its proceedings five years before the 1978 Code was enacted. As

enacted, § 502(b)(7) contains no limitation to "management," "entertainment" or "sports" contracts. The legislative history of the 1978 Code reflects only an intention to track a similar provision on leases, which had placed a cap on the damages which might be claimed for the rejection of a lease to prevent unjust enrichment of a lessor. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 352-354 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 62-65 (1978).

18. No affidavits or other admissable evidence have been offered to establish that there is a genuine dispute as to material fact. Because this Court is persuaded that Continental is entitled to judgment as a matter of law, summary judgment is appropriate and will be granted. Federal Rules of Civil Procedure 56(e).

19. For the foregoing reasons, the Union of Flight Attendant's claim for contract rejections damages will be disallowed in its entirety.

20. This Court further rules that the value of UFA's claim for contract rejection damages, pursuant to its proof of claim, is estimated, pursuant to 11 U.S.C. § 502(c) to be zero based upon the Court's conclusion that these claims are ultimately without merit.

The Court would note that even if the damages for breach of the collective bargaining agreements were deemed appropriate, UFA's contract rejection damages claims would be limited to the lesser of one year's compensation or the compensation due under the contracts from September 24, 1983 to the date that the contract was no longer effective by its own terms. In the case of the DC-9 contract, damages would thus be limited to compensation for the period September 24, 1983 to October 1, 1983, the

specified expiration date. In the case of the Boeing 727 and DC-10 contract, damages could be no greater than one year's compensation as provided in the Bankruptcy Code, Section 502(b)(7).

These Findings of Fact and Conclusions of Law are hereby incorporated in and made a part of the order attached hereto. It is so

ORDERED AND ADJUDGED this 8th day of May, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re	)	Case No. 83-04019-H2-5
	)	83-04020-H1-5
CONTINENTAL AIRLINES CORP.,	)	83-04021-H3-5
CONTINENTAL AIRLINES, INC.,	)	83-04022-H3-5
TEXAS INTERNATIONAL	)	
AIRLINES, INC.,	)	
TXIA HOLDINGS CORP.,	)	(Chapter 11)
	)	
Debtors.	)	Consol. Case
	)	No. 83-04019-H2-5

ORDER

For the reasons set forth in the Findings of Fact and Conclusions of Law attached hereto, the motion of Debtors for summary judgment disallowing the Air Line Pilots Association's claim for contract rejection damages is hereby granted. In the alternative, the claim for contract rejection damages is hereby estimated to have zero value. It is so

ORDERED AND ADJUDGED this the 26th day of June, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	83-04019-H2-5
	83-04020-H1-5
CONTINENTAL AIRLINES CORPORATION,	83-04021-H3-5
CONTINENTAL AIRLINES, INC.,	83-04022-H3-5
TEXAS INTERNATIONAL	
AIRLINES, INC.,	Consolidated Case
TXIA HOLDINGS CORPORATION	No. 83-04019-H2-5

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO MOTION TO DISALLOW OR TO ESTIMATE AT ZERO VALUE THE CONTRACT REJECTION DAMAGES CLAIMS FILED BY THE AIR LINE PILOTS ASSOCIATION

The following facts are either stipulated, uncontested or established by the evidentiary record in this case, of which the Court takes notice and is considered a proper and adequate basis on which to make these Findings and Conclusions:

FINDINGS OF FACT

1. On September 24, 1983, the Debtors filed petitions for reorganization under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101, et seq.

2. Thereafter, Continental filed a motion pursuant to § 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a), to reject the collective bargaining agreement between Continental Airlines,

Inc. ("Continental") and the Air Line Pilots Association ("ALPA"). After an extended evidentiary hearing, the Court on June 19, 1984, entered its order rejecting the collective bargaining agreement between Continental and ALPA that had been in effect on the day Continental filed its bankruptcy petition. Order Allowing Rejection of Collective Bargaining Agreements June 19, 1984. On April 26, 1985, ALPA filed a proof of claim in the amount of $408,348,552.00 for damages arising from the rejection of the collective bargaining agreement.

3. By its terms, the ALPA contract was amendable on September 30, 1984.

4. In its proof of claim, ALPA claimed contract rejection damages for the period September 24, 1983 through and including September 30, 1985, one full year after the scheduled amendable date.

5. On September 23, 1985, Continental filed a Motion for Summary Judgment on Liability for Contract Rejection Damages and to Estimate the Value of Contract Damage Claims. ALPA and the Union Committee strongly opposed Continental's motion.

6. The ALPA contract relative to the motion here is in evidence in the record described above of which this Court has taken notice. This contract is clear and unambiguous. The contract does not contain any guarantee of employment. Instead, it contains terms as to the wages and working conditions which will be provided to employees covered by the agreements when work is available. When work is not available, the contract provides that management may furlough employees, subject to notice of furlough and furlough pay requirements, which

themselves are subject to exceptions for various contingencies not within management's control.

7. At the time of the filing of the bankruptcy petitions in this matter, Continental unilaterally modified work rules and reduced wages and fringe benefits paid to pilots represented by ALPA as well as those of flight attendants and other employees, pending this Court's approval of Continental's motion to reject the contracts under 11 U.S.C. § 365. See In re Continental Airlines Corp., 38 Bankr. 67 (Bankr. S.D. Tex. 1984). This Court approved the rejection of the pilot contract, effective retroactively to September 24, 1983, in accordance with 11 U.S.[C.] § 502(g). This Court found that if Continental had not made changes in its labor contracts, including specifically the ALPA contract, within a short time Continental would have run out of cash and gone out of business. Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association Collective Bargaining Agreements (August 17, 1984) at 33; Findings of Fact and Conclusions of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA (August 17, 1984) at ¶¶ 28, 40.

CONCLUSIONS OF LAW

1. The unions contend that this Court, which rejected the ALPA and UFA collective bargaining agreements pursuant to the Bankruptcy Code itself, 11 U.S.C. § 365, now does not have jurisdiction to liquidate the claim or to estimate the value of any damages created thereby through the Bankruptcy Code "breach" of these contracts. 11 U.S.C. § 365(g). This contention is clearly without merit. Bankruptcy courts have jurisdiction to decide the allowability of all claims against an estate. 28 U.S.C. §§ 1334(a), (b)(1), (b)(2)(3).

2. The Court has jurisdiction to resolve on the merits the question of liability, if any, and damage claims for contract rejection presented by the present motion. The motion does not require direct interpretation or application of the statutory language of Federal Labor Statutes or any other federal statutes regulating any interstate commerce, and therefore § 157(d) is inapplicable here. The question tests squarely in the bankruptcy claims adjudication process. 11 U.S.C. § 502. In re Continental Air Lines, Inc., Order Granting Debtors' Motion to Estimate, 57 Bankr. 841 (S.D. Tex. 1985).

3. Further, use of the estimation procedure by this Court will allow Continental's reorganization plan to proceed without unnecessary or costly delay to Continental or other creditor groups who may have reached agreement relative to debt repayment. The estimation procedure can, however, be simplified by resolution of the summary judgment issues now on file by the Court's review of undisputed facts and facts previously established in the case, and application of the appropriate law.

4. The courts have recognized that bankruptcy judges have discretion to determine the allowability of claims in bankruptcy even if the claim ordinarily would have been liquidated by another tribunal. Of course, in the absence of bankruptcy, every claim would have been resolved in another forum. In Zimmerman v. Continental Air Lines, Inc., 712 F.2d 55, 56 (3d Cir. 1983), cert. denied, 104 S.Ct. 699 (1984), a manufacturing company entered into a contract with Continental which contained an arbitration clause. The Arbitration Act, 9 U.S.C. §§ 1-208, "requires a federal court to stay proceedings pending arbitration if issues pertinent to the dispute are also the subject of an arbitration agreement between the parties." 712 F.2d at 56. Subsequently, the manufacturing company went into bankruptcy and initiated

adversary proceedings against Continental alleging that Continental's claim under the contract was improper. Under the authority of the Arbitration Act, Continental requested that the matter be deferred to arbitration.

The bankruptcy court there denied Continental's request, the Third Circuit affirmed, and the Supreme Court denied certiorari. Relying on the policies underlying the 1978 Bankruptcy Reform Act, the Third Circuit held that the Act impliedly modified the express provisions of the Arbitration Act. 712 F.2d at 56, 59.

> Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. See 28 U.S.C. § 1334. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance. Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the Bankruptcy Court.

712 F.2d at 59-60 (emphasis supplied).

5. The unions rely upon Gary Aircraft Corp. v. United States (In re Gary Aircraft Corp.), 698 F.2d 775 (5th Cir.), cert. denied, 104 S.Ct. 82 (1983), and argue that bankruptcy courts lack

jurisdiction to disallow claims in disputes that Congress has committed to a specialized tribunal. The union's reliance on Gary Aircraft is misplaced. Gary merely established that, under the 1898 Act, bankruptcy courts ordinarily should defer to the Armed Services Board of Contract Appeals ("ASBCA") for the liquidation of claims arising from government defense contracts. (The Gary case factually originated with Gary filing a claim under its contract against the government, and with the government filing a counterclaim.) The case does not provide that bankruptcy courts have no "jurisdiction" over such claims. Moreover, the Fifth Circuit based its decision on its findings that deferral would not impair the satisfaction of other bankruptcy claims and that government contracts are extremely complex, technical and esoteric, 698 F.2d at 782, not on the proposition that every claim in bankruptcy which otherwise would have been decided by a "specialized tribunal" should be liquidated by that tribunal.

To the contrary, the Fifth Circuit expressly acknowledged that, where bankruptcy court estimation or liquidation by the ASBCA would unduly delay the administration of the estate, the bankruptcy court retains the power under the 1898 Act to disallow the claim in its entirety. 698 F.2d at 784 n.7. Under the 1973 Bankruptcy Code, which applies to this proceeding, the authority of a bankruptcy court to estimate the value of unliquidated claims is, if anything, even stronger, since new 11 U.S.C. § 502(c) requires the court to estimate the value of unliquidated claims

where liquidation would unduly delay reorganization.[1] The 1978 Act significantly expanded bankruptcy subject matter jurisdiction:

> [The 1978 Act] evidenced a strong Congressional and federal policy in favor of the newly created bankruptcy court having jurisdiction which is sufficiently broad to promptly and expeditiously hear and determine all controversies involving matters of law, equally and even admiralty.

In re Cross Electric Co., 9 Bankr. 408, 410 (Bankr. W.D. Va. 1981); see Zimmerman v. Continental Air Lines, Inc., supra, 712 F.2d at 56.

6. In addition, Continental's motion for summary judgment and estimation in this claims proceeding presents a very different case for bankruptcy court resolution of the issues than was present in Gary. First, unlike Gary, the time necessary to complete arbitration of the union's multi-million dollar contract rejection claims could seriously impair the claims and interests of

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[1] See Addison v. Langston (In re Brints Cotton Marketing, Inc.), 737 F.2d 1338, 1340-41 (5th Cir. 1984); In re Curtis, 40 Bankr. 793, 801 n.7 (W.D. La. 1984); In re Nova Real Estate Investment Trust, 23 Bankr. 62, 65 (Bankr. E.D. Va. 1982); In re Brada Miller Freight Systems, Inc., 8 Bankr. 62 (Bankr. N.D. Ala. 1980); 3 Collier on Bankruptcy ¶ 502.03 at 502-74, 75 (15th ed. 1985). Accordingly, even if this Court did not have jurisdiction to disallow the claim, it is clear that the Court nevertheless would have jurisdiction to estimate the value of the contract rejection claims. Order Granting Debtors' Motion to Estimate All Contingent Unliquidated Employee Claims For Purposes of Chapter 11 Confirmation Pursuant to Section 502(c) of the Bankruptcy Code (Sept. 26, 1985). Thus, for example, courts may estimate the value of claims asserted on behalf of employees by the NLRB, without deferring to any NLRB administrative process, which might otherwise apply. In re Unit Parts Co., 9 Bankr. 386 (W.D. Okl. 1981) (court rejects the same arguments and authorities presented by the unions here, refusing to defer to NLRB, noting that these authorities predate the 1978 expansion of bankruptcy court jurisdiction).

the substantial body of other creditors who have already settled with the debtors and now await distribution. As pointed out in another case, in Gary "the only asset of the bankrupt's estate . . . consisted of a . . . contractual claim against the United States government." In re Compton Corp., 40 Bankr. 880, 884 (Bankr. N.D. Tex. 1984). Where resolution of a claim could "affect the amount, existence and priority of claims to be paid out of the general funds, and thus involve the interest of other creditors," courts have held that a bankruptcy judge does not abuse his discretion in refusing to compel arbitration of such a claim. In re F&T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981); see Johnson v. England, 356 F.2d 44, 51-52 (9th Cir.), cert. denied, 384 U.S. 961 (1966). Moreover, since "[p]rotection of general creditors is a major function of . . . bankruptcy proceedings," submission of the union claims to arbitration would be particularly unsound because Continental's creditors have not consented to arbitration and would have no right to participate in the arbitration process. 649 F.2d at 1233 n.1; 356 F.2d at 52.[2]

Second, unlike the ASBCA in Gary, RLA arbitration panels (system boards of adjustment) are not specialized tribunals with particular expertise in the specific issues of fact that must be resolved in order to value the claim as it relates to this proceeding. If presented to a system board, bankruptcy contract rejection claims would be decided by arbitrators who would not necessarily be more familiar with the particular contract language or past practice of the parties than is this Court, and who may, like this Court, have to take evidence and hear testimony in order to resolve any actual issues of fact, if any exist. Unlike the Court, however, the arbitrators would have no cognizance of the reor-

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[2] In addition, in arbitration there would be no right to discovery, arbitrators are less likely to follow legal standards than courts, and judicial review would be limited. See Zimmerman, Cross and Johnson, supra.

ganization or the interests of other creditors. Particularly, in these circumstances, deferral to arbitration is not required. See In re Amalgamated Foods, Inc., 41 Bankr. 616, 617, 619 (Bankr. C.D. Cal. 1984) (debtor need not submit claims under the Employee Retirement Income and Security Act to arbitration since the bankruptcy claims process is adequate to resolve claims.)

Third, Gary was decided under the 1898 Act. Bankruptcy courts which have considered Gary generally have found it inappropriate to defer claims to another forum in cases under the 1978 Code. For example, in Amalgamated Foods, the court refused to defer a claim under the Employee Retirement Income Security Act ("ERISA") to arbitration even though the statute contains a mandatory arbitration procedure. Distinguishing Gary and Nathanson v. NLRB, 344 U.S. 25 (1952), the court rejected the creditor's contention that the claim required expertise not possessed by the court. 41 Bankr. at 618-619. Comparing the bankruptcy claims process under the 1978 Bankruptcy Reform Act to ERISA's statutory arbitration procedure, the court concluded that both procedures furthered the policy of speedy disposition.

> I find that the bankruptcy claims procedure achieves the goal sought by ERISA arbitration — indeed, that the claims procedure may serve that goal better than ERISA arbitration itself. For that reason, I hold that the debtor may bypass arbitration in favor of the claims procedure.

41 Bankr. at 616-617. See also In re Page-Wilson Corp., 37 Bankr. 527, 529 (Bankr. D. Conn. 1984); In re Compton Corp., supra, 40 Bankr. at 884.

These cases are undoubtedly correct, since the Bankruptcy Reform Act of 1978:

> [S]ignificantly expands the jurisdiction of the bankruptcy courts and is based on the notion that to protect the positions of both the bankrupt and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such action should be resolved in one expeditious proceeding.

Zimmerman v. Continental Air Lines, supra, 712 F.2d at 56 (emphasis supplied).[3]

7. Finally, and most conclusively, in NLRB v. Bildisco & Bildisco, 104 S.Ct. 1188 (1984), the Supreme Court said that claims for damages arising out of the bankruptcy court's own rejection of a collective bargaining agreement must be adjudicated in the bankruptcy court.

> [C]laims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. See 11 U.S.C. § 502(g); In re Hoe & Co., Inc., 508 F.2d 1126, 1132 (2nd Cir. 1974); Workman v. Harrison, 282 F.2d 693, 699 (10th Cir. 1960). Thus, suit may not be brought against the debtor-i[n] possession under the collective bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.

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[3] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, did not detract from bankruptcy court subject matter jurisdiction, but merely allocated the exercise of that jurisdiction between the bankruptcy and district courts. 28 U.S.C. § 1334; 1 Collier on Bankruptcy ¶ 3.01 at 3-19 to 3-29 (15th ed. 1985); Carlton v. BAWW, Inc., 751 F.2d 781 (5th Cir. 1985).

104 S.Ct. at 1198-99 (emphasis suppl[i]ed). Thus, Gary presents no obstacle to the resolution of this Court of the claims issues, and the unions' jurisdictional objections are totally without merit.

8. Although the rejection of an executory contract constitutes a breach of that contract, 11 U.S.C. § 365(g), Section 502(b)(1) of the Bankruptcy Code, 11 U.S.C. § 502(b)(1), provides that a claim against an estate in bankruptcy is to be disallowed if such claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." The legal standards for measuring the value of a bankruptcy claim for contract breach are therefore the same as those which would be applied if the bankruptcy had not occurred. In re Nuisance Corp., 17 Bankr. 80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy ¶ 502.02, at 502-24 et seq. (15th ed. 1985). A bankrupt in breach of contract pursuant to 11 U.S.C. § 365 may assert any defense to the liability flowing from the statutorily created breach which any other promisor in breach of contract may assert. Mazirow v. Grigsby (In re White Motor Corp.), 44 Bankr. 563 (N.D. Ohio 1984).

9. The Court must therefore determine the allowability of these claims by applying the appropriate substantive law which would have been applied in the non-bankruptcy context. See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 n.8 (5th Cir. 1981); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161 (1946).

10. The rejected contract was entered into pursuant to the Railway Labor Act, 45 U.S.C. §§ 151, et seq., as expressly stated at the outset of the contract. A Railway Labor Act contract, "like the Labor-Management Relations Act § 301 contract, is a federal

contract and is therefore governed and enforceable by federal law, in the federal courts." IAM v. Central Airlines, Inc., 372 U.S. 682, 692 (1963). The Supreme Court has also held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957). Although Continental is subject to the Railway Labor Act, the federal courts have often looked to decisions interpreting the National Labor Relations Act, including § 301 of the LMRA amendments to that Act, for guidance in RLA matters. See generally Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (although NLRA cannot be imported wholesale into the railway labor area, NLRA case law provides "the most relevant corpus of national labor policy"); Japan Airlines Co. v. IAM, 538 F.2d 46 (2d Cir. 1976) (using NLRA Supreme Court decisions to delineate scope of mandatory subjects of bargaining under the RLA).

11. As a matter of federal labor law, employees subject to a collective bargaining agreement are not entitled to lost future wages as damages under such an agreement when the employer ceases operations, unless the agreement guarantees future employment. See, e.g., J.I. Case v. NLRB, 321 U.S. 332 (1943); Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (6th Cir. 1963); American Bakery & Confectionery Workers v. Great Atlantic & Pacific Tea Co., 357 F. Supp. 1322 (W.D.Pa. 1973), aff'd mem., 491 F.2d 748 (3d Cir. 1974); Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290 (S.D. Ohio 1983), aff'd mem., 738 F.2d 438 (6th Cir. 1984); Union de Trabajadores v. Helio San Jeronimo Corp., 434 F. Supp. 643 (D.P.R. 1977); Hotel & Restaurant Employees Alliance, Local 237 v. Allegheny Hotel Co., 374 F. Supp. 1259 (W.D. Pa. 1974). As noted above, the contract at issue did not guarantee employment, but only provided the terms and conditions applicable to available work.

The presence of contract provisions which permitted management to furlough employees confirms that by their own terms these contracts were not understood or intended to constitute guarantees of employment.

12. As a matter of federal labor law under both the NLRA and the RLA, and as a matter of the common law of contracts in general, no promisee is entitled to more than nominal damages for breach of contract unless that promisee can demonstrate actual injury proximately caused by the breach. IBEW v. A-1 Electrical Services, 535 F.2d 1, 3 (10th Cir.), cert. denied, 429 U.S. 832 (1976); Brotherhood of R.R. Trainmen v. Denver & R. G. W. R. Co., 338 F.2d 407 (10th Cir. 1964), cert. denied, 380 U.S. 972 (1965); Restatement (Second) of Contracts §§ 346-347.

13. As noted above, but for the rejection of the collective bargaining agreement, Continental would have ceased operations and pilots would have had no cognizable claims for lost future wages because the rejected contracts did not obligate Continental to provide employment, but rather only established rates of pay and working conditions for any employment which was available. Federal labor law does not require an award of damages for time periods during which no work would have been available in any event, even where an employee was discharged in violation of the NLRA. See NLRB v. Biscayne Television Corp., 337 F.2d 267, 268 (5th Cir. 1964); Nabors v. NLRB, 323 F.2d 686, 690 (5th Cir. 1964); Midland Ross, Inc., 239 N.L.R.B. 1205 (1979), order enf'd, 653 F.2d 239 (6th Cir. 1981); NLRB v. United Contractors, Inc., 614 F.2d 134, 138 (7th Cir, 1980); NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1393 (8th Cir. 1974); NLRB v. American Creosoting Co., 139 F.2d 193 (6th Cir. 1943); Brown & Root, Inc, 112 N.L.R.B. 295 (1955); Lauren Burt, Inc. of Colorado, 114 N.L.R.B. 295 (1955); Hill Transportation Co., 102

N.L.R.B. 1015 (1953). But for the Court's rejection of the collective bargaining agreement at issue here, Continental would have gone out of business and pilots represented by ALPA could not have claimed lost future wages as damages, because the agreements did not guarantee future employment.

14. Even if ALPA's claim for damages was meritorious, ALPA's damage calculations are flawed. The amount of damages to be awarded for breach of a collective bargaining agreement is limited by both the termination date of the agreement at issue and by the application of 11 U.S.C. § 502(b)(7). The termination date of the contract establishes the ending date for damage calculation purposes.

> The fact that the contract which was breached was due to expire April 30, 1976, is controlling as to the period for which damages may be awarded. Nothing in that contract could have created an expectation that the employees would have continued to enjoy the same wages and benefits beyond the expiration of the contract.

IBT v. Standard Brands, 579 F.2d 1292, 1295 (5th Cir. 1978), cert. denied, 443 U.S. 913 (1979). Accord, UAW v. Roblin Industries, 561 F. Supp. 288, 298 (W.D. Mich. 1983) (rights under agreements can extend beyond expiration date only if agreement so provides); Sun Oil Co. of Pa. v. NLRB, 576 F.2d 553, 558 (3d Cir. 1978); Baker v. Fleet Maintenance, Inc., 409 F.2d 551, 554 (7th Cir. 1969); In re Vic Snyder, Inc., 23 Bankr. 185 (E.D. Pa. 1982). As previously noted, the ALPA contract expired by its own terms on September 30, 1984. ALPA's use of September 30, 1985 as the ending date for the contract in its calculations is based upon assertions regarding the "average" length of negotiations in the airline industry. These assertions are unsupported by any probative

evidence and have not been shown to bear any relationship to the "average" length of negotiations at Continental and Texas International Airlines, as ALPA's own witnesses admitted in depositions regarding their calculations. Deposition of Dennis Higgins at 161-63, 165 (Aug. 8, 1985); Deposition of Jalmer Johnson at 112-13 (Aug. 7, 1985), 235-37 (Aug. 13, 1985). The assertions bear no relationship at all to what, in fact, would have happened to Continental, which was not in "average" financial condition, if the contracts had not been rejected.

15. Continental's obligation, under the Railway Labor Act, to maintain the "status quo" after the contracts expired is excused by the Bankruptcy Code. NLRB v. Bildisco & Bildisco, 104 S.Ct. 1188 (1984) (despite statutory obligation to maintain wages and working conditions provided for in collective bargaining agreement, Chapter 11 debtors may unilaterally lower wages prior to order rejecting the agreement); Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association on Collective Bargaining Agreements (August 17, 1984) at 30-40.

16. An addition to the restriction on damages created by the term of the contract, Section 502(b)(7), 11 U.S.C. § 502(b)(7), further limits damages for breach of "employment contracts" to a maximum of one year's compensation. Collective bargaining agreements are "employment contracts" within the meaning of 11 U.S.C. § 502(b)(7). In re Cortland Container Corp., 30 Bankr. 715 (Bankr. N.D. Ohio 1983).

17. ALPA's reliance on the Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 (1973), to argue that Section 502(b)(7) does not apply to collective bargaining agreements is unpersuasive. In that Report, a commission (not the Congress) described a provision similar to

what became Section 502(b)(7) as "principally" (not exclusively) intended to apply to long-term management contracts, and to the termination of contracts for future "athletic, entertainment or other services." The language under discussion itself indicates that the commission did not intend the cap provision to apply only to such contracts. Moreover, the report in questions is not part of the legislative history of the 1978 Bankruptcy Code at all, but is a report of a national commission on bankruptcy which concluded its proceedings five years before the 1978 Code was enacted. As enacted, § 502(b)(7) contains no limitation to "management," "entertainment" or "sports" contracts. The legislative history of the 1978 Code reflects only an intention to track a similar provision on leases, which had placed a cap on the damages which might be claimed for the rejection of a lease to prevent unjust enrichment of a lessor. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 352-354 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 62-65 (1978).

18. No affidavits or other admissable evidence have been offered to establish that there is a genuine dispute as to material fact. Because this Court is persuaded that Continental is entitled to judgment as a matter of law, summary judgment is appropriate and will be granted. Federal Rules of Civil Procedure 56(e).

19. For the foregoing reasons, ALPA's claim for contract rejection damages will be disallowed in this entirety.

20. This Court further rules that the value of ALPA's claim for contract rejection damages, pursuant to its proof of claim, is estimated, pursuant to 11 U.S.C. § 502(c), to be zero based upon the Court's conclusion that these claims are ultimately without merit.

The Court would note that even if the damages for breach of the collective bargaining agreements were deemed appropriate, ALPA's contract rejection damages claims would be limited to the lesser of one year's compensation or the compensation due under the contracts from September 24, 1983 to the date that the contract was no longer effective by its own terms. Damages would thus be limited to compensation for the period September 24, 1983 to September 24, 1984. These Findings of Fact and Conclusions of Law are hereby incorporated in and made a part of the order attached hereto. It is so

ORDERED AND ADJUDGED this the 26th day of June, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 13 1989
Jessee E. Clark, Clerk
By Deputy: /s/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re	§	
	§	CONSOLIDATED
CONTINENTAL AIRLINES CORP., et al.,	§	BANKRUPTCY
Debtors.	§	CASE NO.
	§	83-04019-H2-5
	§	
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	§	
Appellant,	§	CIV. NO. H-85-6151
v.	§	
CONTINENTAL AIRLINES CORP., et al.,	§	
Appellees.	§	
	§	
O'NEILL GROUP,	§	
Appellant,	§	CIV. NO. H-87-2321
v.	§	
CONTINENTAL AIR LINES, INC., et al.,	§	
Appellees.	§	
	§	

UNION OF FLIGHT ATTENDANTS, Appellant,	§	
	§	CIV. NO. H-85-2271
v.	§	
CONTINENTAL AIRLINES CORP., et al., Appellees.	§	

IT IS ORDERED that the Bankruptcy Court's Orders of September 10, 1985, May 8, 1986 and June 26, 1986 denying contract rejection damages claims are hereby AFFIRMED.

DATED this 10th day of March, 1989.

/s/ John V. Singleton, Jr.
JUDGE SINGLETON

APPENDIX F

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

AUG 04 1989
Jesse E. Clark, Clerk
By Deputy: /s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
CONTINENTAL AIRLINES, INC.,	§	BANKRUPTCY
	§	CASE NO.
Debtor	§	83-04019-H2-5
	§	
	§	
JAMES C. STEPHENS, ET AL.,	§	
JOSEPH E. O'NEILL, ET AL.,	§	
	§	
Appellants,	§	
	§	
VS.	§	CASE NO. H-87-3705
	§	
CONTINENTAL AIRLINES, INC.,	§	
	§	
Appellee	§	

MEMORANDUM & ORDER

The matter now before this Court is the appeal of the Bankruptcy Court's June 27, 1986 Order granting Continental Airline's Motion for Summary Judgment Disallowing and Estimating at Zero the Furlough Pay Claims filed by Individual Continental Pilots.

I. BACKGROUND

A. Continental Enters Bankruptcy

On September 24, 1983 Continental Airlines, Inc. and Texas International Airlines, Inc. filed petitions for reorganization pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101 et seq. Continental immediately suspended its domestic passenger service, but announced that it would resume those operations on September 27, 1983. Continental's international operations continued without interruption. As permitted by 11 U.S.C. § 502(g), Continental rejected its collective bargaining agreement with the Airline Pilots Association ("ALPA"), commonly called the "Red Book," and that rejection was subsequently approved by the Bankruptcy Court retroactive to September 24, 1983.

Although Continental furloughed numerous management, clerical and maintenance employees on September 24, 1983, Continental claims that no pilots were furloughed. Continental implemented emergency work rules for pilots and other employees, and advised pilots of the new work rules by a letter distributed by Company telex and mailed to their homes on September 24, 1983. Continental did not issue any furlough notices to pilots, and the

Chairman of ALPA's negotiating committee admitted during testimony in the Bankruptcy Court that John Adams, Vice President of Personnel, expressly notified him that pilots were not on furlough status and that, as active employees, pilots would continue to be covered by health insurance. Continental officials began calling pilots shortly after the bankruptcy petitions were filed to ask them to report for work when operations resumed on September 27, 1983.

On October 1, 1983 ALPA and the Union of Flight Attendants each commenced strikes against Continental in response to Continental's implementation of the emergency work rules. The International Association of Machinists and Aerospace Workers had previously called a strike to begin August 13, 1983. All three unions established picket lines at company facilities, and urged their members not to report for work. Notwithstanding the strikes, Continental began to rebuild its system and made a strenuous effort to get striking pilots to return to service. When it became clear that Continental could not encourage enough striking pilots to return to work to meet its staffing needs, Continental began hiring replacement pilots in November 1983.

On June 19, 1984 the Bankruptcy Court approved Continental's rejection of the ALPA collective bargaining agreement, effective retroactively to September 24, 1983, in accordance with 11 U.S.C. § 502(g). In approving the rejection of the ALPA collective bargaining agreement, the Bankruptcy Court concluded in its August 17, 1984 Order that:

> [H]ad Continental not made its unilateral changes in pilot pay and work rules, it would have been unable to continue its operations for very much longer for want of necessary cash and, because it could not compete effectively with the low

cost carriers in direct competition with it, it would have continued losing money until it closed its doors.

In Re Continental Airlines, et al. No. 83-04019-H2-5 (Bankr. S.D. Tex. 1984) (Memorandum authorizing rejection of ALPA collective bargaining agreement).

B. ALPA Files Claims Against Continental

On April 26, 1985 ALPA filed bankruptcy claims on behalf of all Continental pilots, including a claim for alleged damages arising from the rejection by the Bankruptcy Court of ALPA's prepetition collective bargaining agreement with Continental, and for alleged wrongful constructive discharge of pilots by virtue of the rejection of the ALPA contract and the institution of new work rules for pilots.

By orders dated September 10, 1985 and June 26, 1986 the Bankruptcy Court granted Continental's motions for summary judgment on contract rejection damage claims. The Court held that, as a matter of federal labor law, employees were not entitled to contract rejection damages for time periods during which they were on strike; that they were not entitled to damages for periods of time not on strike because the rejected collective bargaining agreements were not a guarantee of employment and wages; and that Continental would have gone out of business if its labor agreements had not been rejected, in which case pilots would have had no cognizable claims for lost future wages. On October 1, 1985 the Bankruptcy Court disallowed ALPA's claims for wrongful constructive discharge damages, finding that the change in wages and work rules that occurred on September 24, 1983 did not constitute a constructive discharge. In re Continental Air-

lines., 57 Bankr. 845 (Bankr. S.D. Tex. 1985), appeal dismissed, Civil Action No. H-86-253 (S.D. Tex. Aug. 29, 1988).

This Court upheld the September 10, 1985 and June 26, 1986 orders by Order dated March 10, 1989. Although ALPA filed an appeal from the October 1 Order denying claims for constructive discharge, neither the O'Neill group nor any other pilot attempted to intervene into ALPA's appeal. ALPA's appeal was dismissed on August 29, 1988, pursuant to a settlement between ALPA and Continental.

C. The Furlough Pay Claims

The 88 pilots in the Stephens Group and the 347 pilots in the O'Neill Group were among the approximately 1069 pilots who filed individual claims for furlough or severance pay. ALPA did not assert a claim for furlough pay on behalf of any pilots. The Stephens and O'Neill groups' claims for furlough or severance pay are based on the theory that Continental's temporary suspension of its operations between September 24 and September 27, 1983 constituted a "furlough" entitling pilots to furlough pay under the terms of the collective bargaining agreement rejected by the Bankruptcy Court.

On September 30, 1985 Continental filed its Motion for Summary Judgment Disallowing and Estimating at Zero Value the Furlough Pay Claims Filed by Individual Continental Pilots ("Motion for Summary Judgment"). On October 25, 1985 ALPA filed an opposition to which Continental filed a reply. The Stephens and O'Neill Groups later filed their own oppositions to the Motion for Summary Judgment, to which Continental also replied.

On June 27, 1986 the Bankruptcy Court granted Continental's Motion for Summary Judgment and entered Findings of Fact and Conclusions of Law. In re Continental Airlines, 64 Bankr. 882 (Bankr. S.D. Tex. 1986). The Bankruptcy Court found, inter alia, that:

> Neither pilots nor flight attendants were furloughed on September 24, 1983, as that term is used in the respective prepetition collective bargaining agreements. Indeed, pilots and flight attendants were expressly put on notice by the Company's September 24 letter that they were on active status following the bankruptcy. Nor were the pilots or flight attendants "constructively" furloughed by virtue of the temporary shutdown in operations. The Continental-ALPA collective bargaining agreement expressly provides for brief cancellations of scheduled flights, such as occurred during the three-day shut-down... The fact that the collective bargaining agreement included a contract provision, distinct from the furlough pay section, which expressly recognized and provided for the short-term cancellation of flights demonstrates in the opinion of this Court, that the furlough pay provision was not intended to cover the three-day cessation of operations which occurred on September 24.

Id. at 887-88. The Bankruptcy Court further found that "[t]o allow furlough pay in the circumstances presented here would result in the pilots . . . receiving up to five months pay for a mere three-day suspension of work, virtually guaranteeing a windfall for the entire pilot . . . workforce." Id. at 888. Thus, the Court found that "the events of September 24, 1983 did not give rise to furlough pay liability to pilots . . . ." Id. at 890. The Stephens and O'Neill Groups subsequently filed a joint Notice of Appeal on July 7, 1986. On December 3, 1987 this Court dismissed the ap-

peal for failure to comply with Bankruptcy Rule 8009, but the pilot groups' motion to reinstate the appeal was granted on March 10, 1989.

II. DISCUSSION

The Stephens and O'Neill Groups appeal the Bankruptcy Court's June 27, 1986 decision on the grounds that (1) the Bankruptcy Court's finding that a furlough did not occur on September 24, 1983 was erroneous; (2) summary judgment was improper because the evidence raised genuine issues of material fact; (3) the Court's use of the estimation process to value the pilots' furlough pay claims at zero was inappropriate; and (4) the bankruptcy judge was required to recuse himself because of communications he had with one of the law firms representing Continental regarding possible future employment.

None of these contentions has any merit. First, the Bankruptcy Court's determination that a furlough did not occur is fully supported by the evidence, which showed that the notices sent to pilots on September 24 clearly indicated that they were not being furloughed; that Continental's efforts to persuade the pilots to return to their jobs belied any possible intent to furlough them; and that the provisions of the ALPA-Continental collective bargaining agreement did not require that furlough notices be issued in the event of a temporary suspension of operations such as occurred on September 24, 1983.

Second, the Bankruptcy Court's findings of fact were based upon undisputed, competent evidence, including extensive testimony, exhibits and binding rulings from prior bankruptcy proceedings in which the pilots were represented by their union, ALPA.

Third, the pilots' furlough pay claims arise out of the application of the rejected ALPA-Continental collective bargaining agreement. The rejection of that agreement removes any possible basis for the pilots' claims here.

Finally, the Stephens and O'Neill Groups' assertion that the Bankruptcy Court's June 27, 1986 order should be vacated because Judge Roberts, who issued the ruling, engaged in improper, prejudgment employment communications with a law firm representing Continental is without merit. The pilots' own evidence shows that Judge Roberts first discussed employment with the law firm he later joined on July 2, 1986, after he had issued the order on appeal here. Judge Roberts' present employment is irrelevant to this appeal, and appellants have shown no impropriety in his action.

For the reasons summarized above and more fully stated below, this Court is of the opinion that the Bankruptcy Court's granting of summary judgment was proper.

A. The Bankruptcy Court Correctly Determined That The Temporary Cessation Of Operations On September 24, 1983 Did Not Constitute A Furlough.

The Bankruptcy Court correctly determined as a matter of law that the pilots were not entitled to furlough pay because no furlough occurred on September 24, 1983. Continental's communications with its pilots at the time of the shutdown and its immediate efforts to get the pilots to return to their jobs are totally inconsistent with the claim that they were furloughed. Furthermore, the furlough procedures contained in Section 23 of the Red Book clearly demonstrate that a temporary suspension of operations, like that which occurred on September 24, did not

constitute a "furlough" as that term was used in the collective bargaining agreement.

1) No Indicia of Furlough Status

The Stephens Group claims that Continental treated pilots as furloughees during the shutdown. As support for this claim, the Stephens Group cites a September 24, 1983 letter sent to all employees in which Continental expressly stated that it was furloughing management, clerical and maintenance employees and personnel at stations to be closed, and that pilots would work under the new work rules. Despite this language, the Stephens Group contends that the letter, in effect, "directed . . . domestic pilots to absent themselves from work" until further notice from Continental. This, in their view, constituted a furlough in fact. Written notice, according to the Stephens Group, is not a precondition to the occurrence of a furlough. As the Bankruptcy Court correctly found, however, the contract expressly contemplated temporary flight cancellations that would not constitute furloughs. Whether or not the September 24 letter directed pilots to "absent themselves" from work, the fact remains that the letter (1) did not include pilots among the categories of employees to be furloughed, (2) expressly stated that a portion of domestic operations would be restored shortly, and (3) indicated that the pilots would be subject to new work rules. The September 24 letter simply provides no basis for a finding that the pilots were being furloughed at all.

The Stephens Group also argues that the cancellation of dental insurance for a number of pilots proves that these pilots were on furlough in light of Continental's September 29 announcement that all active pilots would be covered by the new group insurance. Accordingly, the Stephens Group contends that pilots who lost

their pre-bankruptcy dental insurance were on furlough rather than active status. This claim is completely without merit. The September 29 mailgram does not state that any pilots were furloughed on or after September 24, but rather explains that only pilots in active status (and not those pilots who were on furlough prior to September 24) would be covered by Continental's new group insurance programs. Unlike the insurance policy in effect prior to the bankruptcy filing, the new group insurance referred to in the September 29 announcement included only limited dental coverage. The notation on the insurance claim returned to Mr. Stephens, which the Stephens Group interprets to mean that benefits were denied because Mr. Stephens had been furloughed, in fact states only that benefits were being denied because "the self-funded dental benefit plan for Continental Airlines employees was cancelled." Mr. Stephens' insurance claim thus was denied solely because of the change in coverage, and nothing in the September 29 mailgram or the notation on his insurance claim suggests otherwise.

2) Continental Affirmatively Encouraged Pilots To Return To Work

In order to counter the undisputed evidence that the suspension of service was meant to be only temporary, the O'Neill Group argues that the impact on the pilots was not temporary, because of the drastic reduction in force following the shutdown and the imposition of the emergency work rules. The evidence is undisputed, however that Continental did everything it could to build back its operations after the shutdown as quickly as possible. Upon filing its petitions for reorganization, Continental immediately went on a campaign to get the remaining pilots to agree to fly under the emergency work rules. The major obstacle Continental faced was ALPA's October 1, 1983 strike. To counter that

strike, Continental maintained a telephone bank from which pilots were called and requested to fly, made a strenuous effort to get striking pilots to return to service, and delayed hiring replacement pilots until it felt it had to do so to service its reexpanding route system. It was the pilot strike that significantly restricted Continental's ability to expand and prolonged the time that pilots were inactive.

Beginning on the date of the strike, Continental's flight schedules were largely determined by the availability of sufficient numbers of pilots. Having deliberately withheld their services from Continental, knowing full well that the company had jobs waiting for them should they return, it is disingenuous for those same striking pilots now to contend that their failure to return to work is evidence that they were furloughed and therefore entitled to up to five months' pay during the time they were on strike.

3) The Contractual Provision Did Not Apply To Temporary Shutdown

The Red Book set forth an elaborate and comprehensive set of procedures to handle furloughs, but did not define the term. Section 23, entitled "Reduction in Force, Furlough and Recall," was comprised of four subparts. Part 1 prescribed the procedures to be followed in a reduction in force, including the posting of a notice of "any reduction in force in crew complement at any base/sub-base" stating the reason, number, location, status, and effective date of any reduction. This notice would call for a new system-wide bid for the number of positions and regular lines of flight time remaining after the reduction, and would state the closing date for such new bid at least 30 days after the posting. Pilots affected by the reduction in force were given the right to "displace any pilot junior to them at any base/sub-base in any

status." Part 2 of the Section 23, which set forth the notice requirements and consequences of a pilot base or sub-base closing, is not relevant here because no bases were closed.

Part 3 was entitled "Furlough Rules" and mandated a 30-day written notice of a furlough and described the furloughees' recall rights and responsibilities. For example, pilots recalled from furlough had 30 days from the date of recall in which to report to work, were entitled to certain extended past privileges while on furlough, and could exercise their seniority bidding rights upon recall to bases where "vacancies which necessitated the recalls" existed. Part 4 provided for furlough pay in amounts ranging from one-half month to five months pay, depending on length of service when "a pilot is placed on furlough status."

The Stephens and O'Neill Groups contend that a "furlough" is ordinarily understood to mean a temporary loss of work, that Continental's three-day suspension of operations was such a temporary loss of work, and therefore that the three day suspension constituted a furlough. The argument fails for several reasons.

First, the ALPA contract itself expressly contemplated the possibility that flights would be cancelled, and hence that pilots would occasionally find themselves temporarily without work. Section 3, Part 6 of the Red Book anticipated the possibility of flight cancellations due to holidays, schedule changes, weather or mechanical problems. It guaranteed pilots their pay for trips missed due to these sorts of cancellations in certain circumstances. Section 25, Part 2 anticipated the possibility that pilots would "lose[ ] flying time" from their regular schedules because of cancellations other than those described in Section 3, or "through no fault of [their] own." Plainly, the Red Book did not contemplate that a temporary cancellation of flights would constitute a furlough, but

rather provided a separate contractual means of dealing with such occurrences. The very existence of contract provisions recognizing the possibility of cancellations in flight operations contravenes the O'Neill and Stephens Groups' insistence that any suspension of flight time is a furlough.

Second, the pilots' contention ignores the fact that relatively few pilots were affected at all by the three-day suspension. Unlike most management, clerical, and maintenance employees who were in fact furloughed, pilots do not work normal five-day week, four-week month schedules. As the evidence in the hearing on Continental's Motion to Reject showed, pilots ordinarily were on duty an average of only 14-16 days per month, and many trip schedules allowed for 17-21 days off during the month. Most pilots would have completed all of their flying duties for the month by September 24, and of those that had not, many would not have had a flight scheduled during the three days that the company was shutdown. Thus, the number of pilots who in fact temporarily lost work as a result of Continental's short suspension of service is relatively few. The flight schedules and work patterns of pilots would have made a furlough of the entire pilot workforce unnecessary.

The Bankruptcy Court correctly concluded that Section 23's furlough scheme could not logically apply to the situation at hand. To require Continental to pay up to five months compensation for the temporary shutdown of operations that occurred on September 24, 1983 would indeed provide a windfall to pilots who were in no meaningful sense furloughees at all. As the Bankruptcy Court explained, if a brief company-wide suspension of service activates the furlough pay provision, as claimed by the pilot groups, then the entire pilot workforce would receive double pay for up to five months even though each individual pilot might

have missed only a few or even no flights during the few days of the suspension of operations.

B. The Bankruptcy Court Was Correct In Holding That There Were No Disputed Issues Of Material Fact And That Summary Judgment Should Be Granted.

In accordance with Bankruptcy Rule 7056(c), Continental submitted evidence that demonstrated to the Bankruptcy Court that no controversy existed as to any material fact concerning appellants' furlough pay claims. Based on this competent and undisputed evidence, the Bankruptcy Court correctly determined that the temporary suspension of operations on September 24 was not a furlough.

Both pilot groups argue that the Bankruptcy Court's summary judgment order must be reversed because the testimony and documentation submitted by Continental in support of its motion does not meet the requirements of Bankruptcy Rule 7056(c). That Rule provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Continental supported its motion with competent summary judgment evidence consisting of the findings and conclusions of the Bankruptcy Court in prior proceedings and uncontested testimony identified by the witness' name and the prior proceeding — the Motion to Dismiss or Motion to Reject hearings — in which the testimony was given. These witnesses testified in open court, under oath, and were subject to cross examination by ALPA counsel. Continental's documentary evidence in support

of this motion was identified by exhibit number and the hearing at which it was admitted into evidence.

The Stephens Group erroneously asserts that Continental relied entirely on unsworn statements in its moving papers, and that such averments do not constitute competent summary judgment evidence. This Court is of the opinion that the Bankruptcy Court correctly used the court testimony and admitted exhibits to arrive at its decision.

In its Order disallowing claims for furlough pay, the Bankruptcy Court took judicial notice of the evidentiary record in the Continental bankruptcy proceeding as a whole. A court may "take judicial notice . . . of its own records and files, and facts which are part of its public records . . . . Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it." St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979); In re Saco Local Development Corp., 30 Bankr. 862 (Bankr. D. Me. 1983); In re Leach, 35 Bankr. 100 (Bankr W.D. Ky. 1983).

C. The Bankruptcy Court Correctly Estimated The Pilots' Furlough pay Claims At Zero Value Under 11 U.S.C. 502(c)

In addition to granting summary judgment, the Bankruptcy Court estimated the furlough pay claims to have zero value pursuant to Section 502(c) of the Bankruptcy Code, 11 U.S.C. 502(c), which provides as follows:

> There shall be estimated for purpose of allowance under this section —

(a) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(b) any right to payment arising from a right to an equitable remedy for breach of performance.

The O'Neill and Stephens Groups challenge the appropriateness of estimation in this context. The O'Neill Group argues that the use of the estimation process was inappropriate because the furlough pay claims could have been liquidated without undue delay.

Besides ignoring the fact that Continental also requested and was granted summary judgment, the O'Neill Group has failed to recognize the enormous task which faced the Bankruptcy Court, Continental, and its creditors in adjudicating the labor claims. Over 13,000 employee claimants filed claims totalling approximately $3.9 billion. The furlough pay claims constituted only a small portion of this total. Because of the size of the labor claims, the large number of claimants, and the inordinate length of time that resolution of these claims would have otherwise required, the estimation process authorized by 11 U.S.C. 502(c) provided an appropriate means by which Continental could proceed expeditiously to confirmation of its reorganization plan in the event summary judgment on its motions was denied. See In re Continental Airlines Corp., 57 Bankr. 845 (Bankr. S.D. Tex. 1985).

The O'Neill Group asserts that liquidation of the furlough pay claims could have been accomplished expeditiously, but there are several flaws in that assertion. First, there was no principled way

of separating out one class of claims — for example, the furlough pay claims — from the rest of the employee claims in order to value the furlough pay claims on an individual claim by claim basis. Second, approximately 1069 pilots (including the Stephens and O'Neill Groups) filed claims for furlough pay. Had their claims not been subject to the estimation process, the Bankruptcy Court would have had to hold individual hearings on each claim to determine whether any furlough pay was due. The fact-finding alone would have been inordinately time-consuming and burdensome. For example, by September 24, 1983 many pilots had already completed their scheduled flying for the month of September, so the temporary shutdown did not affect them at all. Others may have been on leave or declined requests to return to work when contacted by Continental. The status and remaining work schedules in September of each individual claimant would have to have been established through testimony and documentary evidence before the bankruptcy judge could evaluate each claim. The liquidation of these claims would undoubtedly have delayed the confirmation of Continental's reorganization plan to the detriment of all other creditors.

Finally, both the Stephens and O'Neill Groups argue that it is inappropriate for the Court to estimate claims at zero value because such a valuation would be the equivalent of disallowing a claim. Estimation of the furlough pay claim at zero is an alternative to disallowance of the claim. Unless such estimation constitutes an abuse of discretion, it cannot be disturbed on appeal. In re Brints Cotton Marketing, Inc., 737 F.2d 1338, 1341 (5th Cir. 1984). It was entirely appropriate for the Bankruptcy Court to use estimation in this manner so as to avoid undue delay in the administration of this case.

D. Judge Roberts' Communications With Continental's Legal Counsel Concerning Employment Opportunities Should Not Result In The Bankruptcy Court's June 27, 1986 Order Being Vacated

Additionally, the pilot groups' allegations of impropriety on the part of Bankruptcy Judge Roberts provide no basis whatsoever for vacating his Order disallowing claims for furlough pay. The O'Neill Group's own recitation of the facts in its motion for withdrawal of the reference belies its attempts to cast his actions in a negative light. The evidence shows that Judge Roberts was not even approached to discuss the possibility of employment with a law firm representing Continental until after he had issued the ruling at issue in this appeal. There simply is no basis for the O'Neill Group's allegation of an "appearance of impropriety," and its attempt to obtain reversal on that ground is without merit.

III. CONCLUSION

A grant of summary judgment under Bankruptcy Rule 7056 and Fed. R. Civ. P. 56(c) shall be affirmed if there is no genuine issue of material fact in dispute and if the party moving for summary judgment is entitled to prevail on the undisputed material facts as a matter of law. City of Madison v. Bear Creek Water Assoc., Inc., 816 F.2d 1057, 1059 (5th Cir. 1987); In re Stuerke, 61 Bankr. 623, 625 (9th Cir. BAP 1986). A Bankruptcy Court's estimation of value of an unliquidated and contingent claim under 11 U.S.C. 502(c) may be disturbed on appellate review only in the event of an abuse of discretion. In re Brints Cotton Marketing, Inc., 737 F.2d 1338, 1341 (5th Cir. 1984). The evidence demonstrates that the Bankruptcy Court had ample grounds for denying the pilots' furlough pay claims and therefore summary judgment was war-

ranted. Additionally, it was appropriate for the Bankruptcy Court to estimate the furlough pay claims at zero. Therefore, it is

ORDERED that the Bankruptcy Court's June 27, 1986 Order granting Continental's Motion for Summary Judgment Disallowing and Estimating at Zero the Pay Claims Filed by Individual Continental Pilots is hereby AFFIRMED.

SIGNED at Houston, Texas this _____ day of _____, 1989.

/s/ John V. Singleton, Jr.
JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2347

In re CONTINENTAL AIRLINES CORP., Et Al., Debtors.

AIRLINE PILOTS ASSOCIATION INTERNATIONAL and James C. Stephens, Et Al., Appellants,

v.

CONTINENTAL AIRLINES, INC., Et Al., Appellees.

U.S. COURT OF APPEALS
FILED
OCT 29 1990
GILBERT E. GANUCHEAU
CLERK

O'NEILL GROUP, Appellants,

v.

CONTINENTAL AIRLINES, INC., Et Al., Appellees

UNION OF FLIGHT ATTENDANTS, Appellant,

v.

CONTINENTAL AIRLINES, INC., Et Al., Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 5-25-90, 5 Cir., 198_, _____ F.2d _____)
(OCTOBER 29, 1990)

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX H

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2943

IN THE MATTER OF: CONTINENTAL AIRLINES, ET AL.,

Debtors.

Joseph E. O'NEILL, et al.,

Appellants,

v.

CONTINENTAL AIRLINES, INC.,

Appellee.

Appeals from the United States District Court
for the Southern District of Texas

(March 21, 1991)

BEFORE BROWN, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:

This case arises out of a bankruptcy proceeding filed by Continental Airlines, Inc. (Continental), on September 24, 1983 (hereafter "the 1983 bankruptcy proceedings"), in the United States Bankruptcy Court for the Southern District of Texas. Two

groups of pilot-employees of Continental appeal the district court's dismissal of their proofs of claim for furlough pay they contend Continental owes them because of a temporary work stoppage which took place around the time of the 1983 bankruptcy petition. On December 3, 1990, Continental filed a second Chapter 11 bankruptcy (hereafter "the 1990 bankruptcy proceedings"), which stayed all judicial actions against the airline by operation of 11 U.S.C. § 362(a). For the reasons stated below, we issued an Order on March 15, 1991, holding that the present appeal is stayed in light of § 362(a) and the 1990 bankruptcy proceedings (see Appendix). We set forth our reasons below.

Facts and Procedural Background

At 5:00 p.m. on September 24, 1983, Continental suspended its entire domestic air passenger service and a portion of its international operations. One and one-half hours later, the airline filed for protection from creditors under the Chapter 11 reorganization provisions of title 11 of the United States Bankruptcy Code. See 28 U.S.C. §§ 1101-1174. On September 27, the airline reopened portions of its domestic service, using substantially fewer pilots than it had employed prior to filing for bankruptcy. Continental cut recalled pilots' salaries by 50 percent or more and significantly reduced their benefits.

Before the April 30, 1985, bar date to file employee-related claims, and relying upon provisions in the collective bargaining agreement between the Airline Pilots Association (ALPA) and the airline, a number of Continental pilots filed individual proofs of claim with the bankruptcy court for furlough pay totalling $32.6 million they contended they were owed as a result of the September 1983 shutdown. With the bankruptcy court's approval, Continental filed motions for summary judgment disposal of a variety of employee-related claims, including furlough pay claims filed by

the individual pilots. ALPA opposed the motion in the pilots' behalf. The court allowed the Stephens and O'Neill Groups, which organized to pursue these claims separately from the union and which include all of the pilot claimants, the opportunity to file their own oppositions. On June 27, 1986, the bankruptcy court granted Continental's motion for summary judgment dismissing the pilots' claims.

On July 7, 1986, the Stephens and O'Neill Groups jointly filed a Notice of Appeal from the June 27 Order to the district court. On December 3, 1987, the district court dismissed the appeal from the bankruptcy court for the pilots' groups' failure to file briefs within the time specified. However, on March 13, 1989, the court granted the two groups' motions to reinstate their appeals. On August 4, 1989, the district court, Singleton, J., issued a memorandum opinion affirming the bankruptcy court's order in all respects. The O'Neill and Stephens Groups perfected their appeal to this Court on August 4, 1989, and oral argument was heard in the case on September 14, 1990. On December 3, 1990, before the Court had rendered its decision in this case, Continental again filed Chapter 11 bankruptcy proceedings, this time in the Delaware bankruptcy court. The parties to this appeal thereafter briefed the court on the question whether the § 362(a) automatic stay provision applies here.

Automatic Stay of the Appeal

Section 362 of title 11 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . .

11 U.S.C. § 362 (emphasis added). Continental contends that this provision stays the present appeal of the pilots' claims against the airline for furlough pay until the current 1990 bankruptcy proceedings, which the airline voluntarily instituted in the Delaware court, are resolved. The pilots counter that the stay does not apply to this proceeding because it is a claim filed in response to Continental's 1983 Chapter 11 bankruptcy and therefore had its genesis in a voluntary initiation of proceedings by the debtor rather than against it. By Order issued March 15, 1991, we held that the § 362(a) stay applies, and state our reasons herein.

This appeal from the district court decision denying the pilots' claim that they are entitled to furlough pay for the three-day work stoppage is certainly the continuation of a judicial proceeding. Therefore, we need only resolve whether this proceeding is "against the debtor." See Freeman v. Commissioner of Internal Revenue, 799 F.2d 1091, 1092-93 (5th Cir. 1986). In Freeman, this Court held that the answer to the question whether a suit is against the debtor and is stayed by § 362(a) "is determined from an examination of the posture of the case at the initial proceeding." Id. at 1093; see also Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 61-62 (6th Cir. 1983). In the O'Neill and Stephens Groups' view, the initial "judicial . . . proceeding . . . commenced" on Setember 24, 1983, when Continental filed a chapter 11 peti-

tion for reorganization; thus, this proceeding, they argue, should be deemed initiated by the debtor.

We disagree. While it may be true that this appeal is linked to the 1983 bankruptcy proceedings, filed by Continental, proofs of claim to which the debtor objects, including this one, are undoubtedly "against the debtor" in the context of § 362(a)(1). This case is different from Freeman, upon which the O'Neill and Stephens Groups rely so heavily. We determined that § 362(a) did not stay that case, a petition for redetermination of federal income tax liability, because the proceedings were clearly begun by the debtor. 799 F.2d at 1093. In contrast, the dispute over the pilots' claim for furlough pay, initiated against Continental, is the subject of the litigation before us. As we stated in In re Simmons, 765 F.2d 547 (5th Cir. 1985), the filing of a proof of claim is analogous to the filing of a complaint in a civil action, with the bankrupt's objection the same as the answer. See id. at 552 (citing Nortex Trading Corp. v. Newfield, 311 F.2d 163, 164 (2d Cir. 1962)).[1]

Accordingly, we reject the pilots' contention that the present appeal is the continuation of a judicial proceeding initiated by the

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[1] The O'Neill and Stephens Groups argue that, because the Simmons language was adopted from a Second Circuit case decided under the now defunct Bankruptcy Act of 1898, this comparison of the proof of claim procedure to a civil case "can have no bearing here." The procedure for filing proofs of claim and objections did not change in any respect material here with the enactment of the current Bankruptcy Code in 1978, however, and the analogy is applicable to this case, as there would be no cause for appeal unless the creditor or equity security holder took action against the debtor to share in the debtor's assets. Compare former 11 U.S.C. § 596 (1958) (repealed) with current 11 U.S.C. § 501 (1982).

debtor, and hold that the § 362(a) stay applies.[2] Only the Delaware bankruptcy court may grant relief from the effect of the automatic stay provision. See 11 U.S.C. § 362(d),(f). The parties are instructed to inform this Court in the event that the Delaware court grants such relief or if the stay lapses. Until we receive such information, all proceedings herein with respect to this appeal are stayed pursuant to the March 15, 1991, Order.

Appendix

(March 15, 1991)

BEFORE BROWN, POLITZ, and JOHNSON, Circuit Judges.

BY THE COURT:

ORDER

Pending before us is an appeal from a summary judgment order of the United States District Court for the Southern District of Texas, Singleton, J., affirming the Bankruptcy Court's grant of Continental's Motion for Summary Judgment against the appellants, the O'Neill and Stephens Groups of 1,069 pilot-employees of Continental (hereafter "Pilots"). Specifically, the Pilots' claims involved in this appeal are for furlough pay arising out the temporary shutdown of operations which occurred around the time

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[2] We likewise reject the pilots' alternative contention that the automatic stay cannot apply because the Delaware court cannot obtain jurisdiction over the pilots' claims, which rests exclusively in the Texas bankruptcy court. Although we foresee problems with transfer of the various claims remaining from the 1983 bankruptcy proceedings, and especially this claim, the broad dictates of § 362(a) nevertheless require that this appeal be stayed. We cannot escape the congressional mandate. See In re Tampa Chain, Inc., 835 F.2d 54 (2d Cir. 1987) (appeal of damages award against bankrupt defendant stayed as of date of filing of Chapter 13 petition).

of Continental's Chapter 11 bankruptcy filing on September 24, 1983.

Since that time, on December 3, 1990, Continental has instituted an entirely new Chapter 11 proceeding in the United States Bankruptcy Court for the District of Delaware (Balick, J.). Continental urges that this 1990 bankruptcy proceeding automatically stays the present appeal. 11 U.S.C. § 362(a). From the outset of the current Delaware filing, this Court has kept the Delaware Court fully informed of Continental's position, by sending photocopies of all briefs and memoranda regarding the automatic stay issue. Because the Delaware Court has thus far taken no position on whether the 1990 proceeding stays the instant appeal, the question is squarely before this Court.

For reasons we will subsequently file, the Court concludes that the present appeal is automatically stayed by operation of 11 U.S.C. § 362(a), in light of the current bankruptcy proceedings. Nothing in this Order shall be construed as a determination of the validity or legality of the Delaware bankruptcy proceedings, and, on the contrary, the Court assumes without deciding that such proceeding is valid and subsisting.

Of course, any party has the right to apply to the Delaware Bankruptcy Court for relief from the stay pursuant to 11 U.S.C. § 362(d).

APPENDIX I

APPENDIX I

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	
	No. 90-932
CONTINENTAL AIRLINES, INC., et al.,	
	Chapter 11
Debtor.	
JOSEPH E. O'NEILL, et al.,	Adversary No. ____
Movants,	
v.	MOTION FOR RELIEF FROM AUTOMATIC STAY
CONTINENTAL AIRLINES, INC., et al.,	
Respondents.	

Pursuant to 11 U.S.C. § 362(d), Joseph E. O'Neill, et al. ("The O'Neill Group", the "Stephens Group" and the Flight Attendants) request relief from the automatic stay imposed by 11 U.S.C. § 362(a) on the ground that modifying the automatic stay will promote judicial economy by allowing pending litigation to proceed to conclusion in another court. This motion is supported

by the petition and the following memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 28th day of March, 1991.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	)	
	)	No. 90-932
CONTINENTAL AIRLINES, INC., et al.,	)	
	)	Chapter 11
Debtor.	)	
	)	
JOSEPH E. O'NEILL, et al.,	)	Adversary No. ____
	)	
Movants,	)	
	)	MEMORANDUM RE
v.	)	MOTION FOR RELIEF
	)	FROM AUTOMATIC
CONTINENTAL AIRLINES, INC., et al.,	)	STAY
	)	
Respondents.	)	

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This is Continental's second resort to Chapter 11 in little over seven years. The first case, filed in Houston, Texas in 1983, is still open and many unresolved claims and issues remain pending in the Texas courts. The purpose of this motion for stay relief is to allow one piece of that long-standing litigation to proceed to conclusion.

II. Continental's First Bankruptcy Is Still Pending.

Continental filed its first Chapter 11 in Houston, Texas on September 24, 1983, primarily to escape its collective bargaining agreements with its pilots, flight attendants and machinists.[1] Continental filed motions to reject those contracts simultaneously upon filing its chapter 11 case and unilaterally modified of the terms of those contracts by imposing new wage scales of approximately one-half the pay required by the negotiated contracts. After the bankruptcy court authorized rejection of the collective bargaining agreements in 1984, the unions filed claims for their damages arising from the rejection of their contracts.[2]

The pilots' claims for contract rejection damages were denied by the bankruptcy court on summary judgment. Most of that ruling was affirmed by the Fifth Circuit Court of Appeals, but a portion of the claim was remanded to the Houston bankruptcy court for a determination of when Continental would have ceased

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[1] The pilots were represented initially by their union, the Air Line Pilots Association ("ALPA"); the flight attendants were represented by their union, the Union of Flight Attendants ("UFA"); and the machinists were represented by the International Aerospace Machinists ("IAM").

[2] After ALPA settled with Continental in late 1985, the bankruptcy court authorized the pilots individually to intervene to pursue their claims that had previously been handled by ALPA. *See In re Continental Airlines Corp.*, 907 F.2d 1500, 1505 (5th Cir. 1990). A group of approximately 394 pilots who did so and were represented by Lewis and Roca became known as The O'Neill Group. Another group of approximately 88 pilots become known as the Stephens Group. On appeal to the Fifth Circuit, the O'Neill Group also included approximately 17 flight attendants, who had previously been represented by the UFA but who intervened on their own behalf after the UFA settled with Continental in much the same fashion as the ALPA settlement. For litigation beyond the Fifth Circuit level, the Stephens Group joined the O'Neill Group. Stay relief is sought here on behalf of all remaining claimants for contract rejection damages, which are collectively referred to as the O'Neill Group in this motion.

doing business absent rejection of the collective bargaining agreements. *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), *rehearing denied*, 918 F.2d 177 (5th Cir. 1990). The O'Neill Group intends to petition the U.S. Supreme Court for certiorari, and an extension of time for doing so was granted to March 28, 1991.

In connection with another appeal that was awaiting decision by the Fifth Circuit when this bankruptcy case was filed, the Fifth Circuit has concluded that the automatic stay arising from this case applies to that appeal. See Exhibit 1 attached hereto. We assume the Fifth Circuit would reach the same conclusion with respect to the contract rejection damages claim. Although such application of the automatic stay also means that the time for petitioning for certiorari is extended by virtue of 11 U.S.C. § 108(c), the O'Neill Group moves for relief from the automatic stay so that litigation can be concluded.

III. Stay Relief Is Appropriate.

Section 362(d) states that the court shall grant relief from the automatic stay "for cause." Relief may include "terminating, annulling, modifying, or conditioning" the stay. 11 U.S.C. § 362(d). The Bankruptcy Code does not clearly define "for cause" and consequently the meaning must be determined on a case by case basis. *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990).

One common cause for lifting the automatic stay is to permit pending litigation to proceed in another court in the interests of judicial economy, where "the liquidation of a claim may be more conveniently and speedily determined in another forum." 2 *Collier on Bankruptcy* ¶ 362.07, at 362-65 (15th ed. 1990). Congress

has granted broad discretion to the bankruptcy courts in deciding whether to grant relief from the automatic stay, *In re Clinton Centrifuge, Inc.*, 81 B.R. 844, 850 (Bankr. E.D. Pa. 1988), since "it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere." *Id.* at 850, *quoting U.S. Code Cong. & Admin. News* 1978, pp. 5787, 5836, 6297.

In *Clinton Centrifuge*, a corporation sought relief from the automatic stay to include a Chapter 11 debtor as a defendant in a state court action for breach of contract. The court recognized that judicial economy was a sufficient basis for granting relief from an automatic stay, but denied the motion to lift stay. The court noted that the stayed matter was not pending prior to the bankruptcy filing, and would not be expeditiously resolved in the non-bankruptcy forum. Therefore, considerations of judicial economy did not outweigh other factors, primarily the desirability of resolving all claims against the debtor in one forum to facilitate the administration of the case. 81 B.R. at 850.

The court in *In re Philadelphia Athletic Club, Inc.* 9 B.R. 280, 282 (Bankr. E.D. Pa. 1981), applied the same principles and granted relief from the automatic stay. The plaintiff sought relief from the automatic stay in order to continue a state court action to recover money from a Chapter 11 debtor for services rendered. The state court action had been pending for several years and was almost complete. The court agreed with the plaintiff's contention that to require that the suit be litigated again in the bankruptcy court would be "unduly repetitive, expensive and time consuming," and "clearly . . . a waste of judicial and legal time and effort."

These cases support relief being granted here. The litigation for which relief is sought has been pending in other courts since 1984. It would be a vast waste of judicial resources not to conclude that litigation at the Supreme Court level, and there is no reason to delay further in doing so.[3]

Section 362(g) provides that the party opposing relief from the automatic stay has the burden of proof on all issues except the debtor's equity in property. Once cause is shown by the party requesting relief, § 362(g) places the burden of proof on the debtor. 2 *Collier on Bankruptcy* ¶ 362.10, at 362-76 (15th ed. 1990). *In re Stranahan Gear Company, Inc.*, 67 B.R. 834 (Bankr. E.D. Pa. 1986). Here, the debtor cannot meet a burden of showing that the pending litigation arising out of its prior bankruptcy should not be concluded where pending. Stay relief should be granted so the contract rejection damages claims arising from the first bankruptcy case can be concluded, hopefully before this new case reaches the plan stage.

IV. Litigation Arising From the First Bankruptcy Should Proceed As Scheduled.

There is a further reason why stay relief is particularly appropriate for claims arising from Continental's first bankruptcy case. Continental's first chapter 11 case remains pending in Texas. Moreover, Continental's confirmed Plan expressly provided in Article 54.1 that the Texas court "shall retain and have exclusive jurisdiction . . . to determine any and all objections to the allowance of Claims [and] to determine any and all applications,

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[3] This motion is filed without prejudice to seeking a change of venue, dismissal of this case or asserting lack of jurisdiction in this Court.

adversary proceedings and contested or litigated matters that may be pending on the Effective Date."

The law is clear that such retention of jurisdiction under a confirmed plan precludes any subsequent bankruptcy court from exercising any jurisdiction over such claims, notwithstanding a successive filing. *In re Colony Square Company*, 779 F.2d 653, 655 (11th Cir. 1986); *In re Colony Square Company*, 788 F.2d 739 (11th Cir. 1986); *Prudential Insurance Company of America v. Colony Square Company*, 40 B.R. 603, 606-07 (Bankr. N.D. Ga. 1984), *aff'd*, 62 B.R. 48 (N.D. Ga. 1985); *Prudential Insurance Company of America v. Colony Square Company*, 29 B.R. 432, 436-37 (W.D. Pa. 1983). To avoid a legal vacuum, all the litigation arising from Continental's first chapter 11 case should be allowed to proceed in the courts where it is pending, and this court should lift the automatic stay so that such other courts having proper jurisdiction are not stayed from proceeding.

WHEREFORE, The O'Neill Group respectfully requests relief from the automatic stay imposed by 11 U.S.C. § 362(a) to

allow it to proceed with the litigation of the contract rejection damages claims arising from Continental's first bankruptcy case.

RESPECTFULLY SUBMITTED this 28th day of March, 1990.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2943

U.S. COURT OF APPEALS
FILED
MAR 15 1991
GILBERT E. GANUCHEAU
CLERK

Joseph E. O'NEILL, et al.,

Appellants,

v.

CONTINENTAL AIRLINES, INC.,

Appellee.

Appeals from the United States District Court
for the Southern District of Texas

(March 15, 1991)

BEFORE BROWN, POLITZ, and JOHNSON, Circuit Judges.

BY THE COURT:

ORDER

Pending before us is an appeal from a summary judgment order of the United States District Court for the Southern District of Texas, Singleton, J., affirming the Bankruptcy Court's grant of Continental's Motion for Summary Judgment against the appellants, the O'Neill and Stephens Groups of 1,069 pilot-employees of Continental (hereafter "Pilots"). Specifically, the Pilots' claims involved in this appeal are for furlough pay arising out the temporary shutdown of operations which occurred around the time

of Continental's Chapter 11 bankruptcy filing on September 24, 1983.

Since that time, on December 3, 1990, Continental has instituted an entirely new Chapter 11 proceeding in the United States Bankruptcy Court for the District of Delaware (Balick, J.). Continental urges that this 1990 bankruptcy proceeding automatically stays the present appeal. 11 U.S.C. § 362(a). From the outset of the current Delaware filing, this Court has kept the Delaware Court fully informed of Continental's position, by sending photocopies of all briefs and memoranda regarding the automatic stay issue. Because the Delaware Court has thus far taken no position on whether the 1990 proceeding stays the instant appeal, the question is squarely before this Court.

For reasons we will subsequently file, the Court concludes that the present appeal is automatically stayed by operation of 11 U.S.C. § 362(a), in light of the current bankruptcy proceedings. Nothing in this Order shall be construed as a determination of the validity or legality of the Delaware bankruptcy proceedings, and, on the contrary, the Court assumes without deciding that such proceeding is valid and subsisting.

Of course, any party has the right to apply to the Delaware Bankruptcy Court for relief from the stay pursuant to 11 U.S.C. § 362(d).

APPENDIX J

APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

IN RE	)	
	)	
CONTINENTAL AIRLINES, INC., et al.,	)	Case No. 90-932
	)	
Debtors,	)	Motion No. M-91-74
	)	
JOSEPH E. O'NEILL, et al.,	)	
	)	
Movants,	)	
	)	
v.	)	
	)	
CONTINENTAL AIRLINES, INC., et al.,	)	
	)	
Respondents.	)	

ORDER

AND NOW, this 12th day of May, 1992, upon consideration of the Motion of Joseph E. O'Neill, et al. (the "O'Neill Group") for Relief from the Automatic Stay to proceed with pending litigation and the Answer of Continental Airlines, Inc. in opposition thereto,

IT IS ORDERED THAT the Motion is GRANTED IN PART and that the automatic stay is lifted for the limited purpose of

(1) allowing the O'Neill Group to file a Petition for Writ of Certiorari with the Supreme Court of the United States to seek review of the Order of the United States Court of Appeals for the Fifth Circuit dated March 15, 1991 in Joseph E. O'Neill, et al. v. Continental Airlines, Inc., No. 89-[2347]; and (2) allowing the parties to file briefs relating to that Petition.

For the purpose of 11 U.S.C. § 108(c), notice of this relief shall be deemed given upon entry of this Order upon the docket of this case. To the extent that the Motion seeks relief from the automatic stay to brief and argue any appeal to the Supreme Court or litigate any remand from any court which has been or may be directed, the Motion is DENIED WITHOUT PREJUDICE and may be renewed following the determination by the United States Supreme Court of the O'Neill Group's Petition for Writ of Certiorari.

/s/ Helen S. Balick
U.S. Bankruptcy Judge

APPENDIX K

APPENDIX K

11 U.S.C. § 365

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such

performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether

or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h) (2) and (i) (2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1208 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1307, or 1208 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the

nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) if such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the non-performance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the in-

terest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to to [*sic*] enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy

law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right

to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or its predecessors or successors, to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

11 U.S.C. § 502

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the

filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a) (7) of this title shall be determined, and shall be allowed under sub-

section (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

45 U.S.C. § 152.

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier grow-

ing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to

determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and

its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten

days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be

effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first

agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

45 U.S.C. § 155

§ 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a

court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the

original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(2)

No. 91-2014

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

O'NEILL GROUP, *et. al.*, *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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July 13, 1992

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QUESTIONS PRESENTED

1. Whether Section 502 of the Bankruptcy Code grants employees who strike their debtor-in-possession employer rights superior to those of strikers in all other circumstances, such that they become entitled to wages and benefits for the time period during which they voluntarily withheld their services and did not work?

2. Whether Section 502 of the Bankruptcy Code grants employees who had no guarantee of future employment an entitlement to future wages and benefits as contract rejection damages for the time period after which the debtor-in-possession employer would have ceased operations?

LIST OF PARTIES

The O'Neill Group, Petitioners in this Court and appellants in the court of appeals, were originally four hundred fifty-two past or present pilots and flight attendants of Continental Airlines, Inc. Annex A to the O'Neill Group's Application to Extend Time to File a Petition for Writ of Certiorari, filed on January 8, 1991 (No. A-528) lists all of the Petitioners. Four hundred of the four hundred fifty-two original Petitioners have settled the claims at issue here.

Respondent and appellee in the court of appeals is Continental Airlines Corp., a corporate predecessor of Continental Airlines, Inc.

RULE 29.1 STATEMENT

Continental Airlines, Inc. is a wholly owned subsidiary of Continental Airlines Holdings, Inc.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

O'NEILL GROUP, *et. al.*, *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Continental Airlines Corp. respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reported at 901 F.2d 1259 (5th Cir. 1990) (Pet. App. A). The Fifth Circuit's order denying petitions for rehearing and suggestions for rehearing *en banc* is unreported (Pet. App. G.). The district court's order, filed March 13, 1989, is unreported (Pet. App. E). The bankruptcy court order dated September 10, 1985 is unreported (Pet. App. B), its order dated May 8, 1986 is unreported (Pet. App. C), and its order dated June 26, 1986 is reported at 64 Bankr. 865 (Bankr. S.D. Tex 1986) (Pet. App. D).

JURISDICTION

This Court, on January 9, 1991, extended the time for filing a writ of certiorari to March 28, 1991, No. A-528. On March 21, 1991, the Fifth Circuit Court of Appeals confirmed that Respondent Continental Airlines Inc.'s ("Continental") bankruptcy petition stayed appellate proceedings arising from an earlier bankruptcy, *In re Continental Airlines,* 928 F.2d 127 (5th Cir. 1991) (Pet. App. H), automatically extending the time for petitioning this Court pursuant to 11 U.S.C. Section 108(c)(2).[1/] The automatic stay was lifted on May 12, 1992 (Pet. App. J), and thereafter the petition for certiorari was timely filed under 11 U.S.C. Section 108(c)(2). This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

After suffering over $500 million in losses during the first five years of airline deregulation, Continental suspended its domestic operations and filed a bankruptcy petition on September 24, 1983. On September 27, 1983, Continental resumed a reduced level of operations and filed a motion with the bankruptcy court to reject its collective bargaining agreements with the Air Line Pilots Association ("ALPA") and the Union of Flight Attendants ("UFA"). The same day, Continental issued "emergency work rules" that

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1/ A corporate predecessor of Continental ("Old Continental") filed a petition in bankruptcy on September 24, 1983. *In re Continental Airlines Corp.*, Consolidated Case No. 83-04019-H2-5 (Bankr. S.D. Tex.) The contract rejection damages claims at issue here were filed against Old Continental, which emerged as a new entity from bankruptcy on September 2, 1986, pursuant to a confirmed plan of reorganization. The reorganized Continental filed its bankruptcy petition on December 3, 1990. *In re Continental Airlines, Inc.*, Case Nos. 90-932 through 90-984 (Bankr. D. Del.) Old Continental is hereinafter referenced as Continental.

called for lower wages and fewer restrictions on the availability of pilots and flight attendants for duty. The new wages and work rules mirrored those in union contracts agreed to in the then-recent reorganization of another carrier, Braniff Airways. ALPA and UFA, including all members of Petitioners, the O'Neill Group, went on strike beginning October 1, 1983.[2/]

On June 17 and December 5, 1984 respectively, the bankruptcy court approved rejection of the ALPA and UFA collective bargaining agreements. (The bankruptcy court's subsequent Memorandum of Authorities Authorizing Rejection of Airline Pilots Association Collective Bargaining Agreements is reproduced at Appendix A hereto.) The court's now-final orders rejecting the labor contracts found that the emergency work rules, adopted only after "considerable and reasonable efforts" by Continental to obtain voluntary modification of the agreements, were necessary for Continental to "compete effectively with the low cost carriers in direct competition with it."[3/] Despite this judicial finding,

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2/ In addition to striking, ALPA and UFA moved to dismiss Continental's bankruptcy petition on the grounds it was filed in bad faith and that the rejection of the union contracts would violate the United States Constitution. *In re Continental Airlines Corp.*, 38 B.R. 67, 69 (Bankr. S.D. Tex. 1984). The bankruptcy court denied the unions' motion finding that Continental "filed . . . for the purpose of attempting to keep the companies alive and functioning and that they had no other viable alternative to that end." *Id.* at 71.

3/ In contrast, the bankruptcy court found that ALPA "does not intend to reach an agreement with Continental on terms the airline can afford." Res. App. A at 16A, that ALPA "appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose pilots are represented by this large and extremely powerful union" (*id.*), and that "ALPA's action to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved." *Id.* at 16A.

the UFA strike continued until April 17, 1985 and the ALPA strike continued until October 31, 1985.

On April 26, 1985, ALPA filed bankruptcy claims for all Continental pilots, $408 million of which was for alleged damages arising from rejection of its collective bargaining agreement with Continental.[4/] Three days later, UFA filed claims for the flight attendants, $409 million of which was for damages claimed to arise from rejection of the UFA's collective bargaining agreements with Continental. Both claims for future wages were premised on (1) full pay and benefits until dates long subsequent to expiration of the collective bargaining agreements, and (2) full pay and benefits for all striking employees during the period when the employees did no work because they were on strike.

In October 1985, the bankruptcy court approved an agreement between Continental and ALPA intended to settle all issues between the parties, including the pilots' contract rejection damage claims.[5/] Continental subsequently reached a similar settlement with UFA which likewise was approved by the court. Certain pilots and flight attendants, including Petitioners O'Neill Group, raised objections to these settlements. These objectors were permitted to opt out of the settlement and file proofs of claim for their pro rata portions of the claims originally filed by ALPA and UFA.

Continental, seeking to dispose of the contract rejection claims, filed a motion for partial summary judgment

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4/ Prepetition wage claims, which have been paid in full to all claimants, are not at issue here.

5/ The Continental-ALPA settlement agreement has previously been reviewed by this Court in *Air Line Pilots Association v. O'Neill*, 111 S. Ct. 1127 (1991).

which asked the bankruptcy court to disallow contract rejection damages claims for the period when the claimants were on strike. This motion was granted on September 10, 1985. An additional motion filed by Continental to disallow all remaining claims for contract rejection damages was granted as to the flight attendants on May 8, 1986 and as to the pilots on June 26, 1986. These two orders held the claimants were not entitled to future wages and benefits because they were not guaranteed future employment under the collective bargaining agreements. All three orders, when appealed to the federal district court, were affirmed.

The O'Neill Group then appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit, in an opinion written by Judge Gee, upheld the order disallowing damages for the period when the employees were on strike ("the strike order") but reversed and remanded the orders disallowing all pre-strike claims ("the business cessation orders"). Judge Garwood, who filed a partial dissent as to the strike order, would have allowed damages for the difference between the collectively-bargained rates of pay and the emergency work rules rates of pay, even though the strikers did not work during this period. As to the business cessation order, the Court unanimously held that, from the date of the bankruptcy petition until some date prior to January 30, 1984 when "Continental would have run...[out] of cash" and "would have had to shut its doors,"[6/] nonstriking employees should receive contract damages claims for the difference between the collectively-bargained rates of pay and the emergency

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6/ A separate, final, bankruptcy court Order had previously found that Continental's Bankruptcy was caused by financial circumstances so dire that "Continental would have run [out] of cash and would no longer be operating at the present time. It would have had to shut its doors even before this hearing commenced [January 30, 1984]." Res. App. A at 30A.

work rules rates of pay. The Fifth Circuit remanded the case for precise specification of that date.

ARGUMENT IN OPPOSITION TO CERTIORARI

The writ should be denied. The decision below does not conflict with any decision of this Court or any other court of appeals; the significance of the questions presented is minimal -- most Petitioners no longer have live claims and legislation inapplicable to this proceeding makes such claims less likely to occur in the future; the allowability of petitioners' claims turned on factual issues not appropriate for review by this Court; and the court of appeals decision is, in all particulars, a correct application of both law and policy.

I. THE DECISION BELOW CONFLICTS WITH NO DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

As Petitioners argued in their Suggestion for Rehearing En Banc to the Fifth Circuit (at p. 5), the decision of the panel below is "the first reported appellate decision in the country concerning the proper measure of contract rejection damages [under the Bankruptcy Code]." Because there is no split in the circuits concerning application of Bankruptcy Code Section 502 to either the strike issue or the business cessation issue, this case does not warrant this Court's consideration.

The Petition's complaint (Pet. at 8-14) that strikers should be paid in full for time they are on strike against their employer is simply not the law, either inside or outside

bankruptcy.[7/] Petitioners' leading case for the notion that they should have received damages for their time on strike, *International Brotherhood of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460 (10th Cir. 1986) ("IML Freight") did not involve a claim for wages at collective bargaining agreement rates for striking employees. The main issue in *IML Freight* was the propriety of a debtor's rejection of a collective bargaining agreement, an issue not present here. Indeed, unlike the present case, the court disapproved the debtor's attempt to reject its collective bargaining agreement. Therefore, there were no Section 502 damage claims from rejection of that agreement. The Tenth Circuit's discussion of damages was limited to the proposition that rejection of a collective bargaining agreement could give rise to damage claims, just as the Fifth Circuit decided here. The Tenth Circuit did not decide, or even discuss, whether strikers should receive damages covering time on strike.

The second half of the petition (Pet. at 14-22) argues that the Fifth Circuit erred in holding that damages for rejection of a collective bargaining agreement (which does not guarantee future employment) should exclude the time period after which the debtor/employer would have ceased to employ anyone. Petitioners' rhetoric that the decision below "contravenes basic bankruptcy law" proves, upon inspection, to be hollow; there is no conflict between the decision below and any decision of this Court or any other court of appeals.

7/ Petitioners assert, without authority, that the decision below creates a conflict between the so-called "right to strike" and the so-called "right to contract rejection damages." No such conflict exists. The strike order upholds well settled labor law principles that strikers have no claim for wages for time not worked. The business cessation order *affirmed* the right to contract rejection damages. *See* Sec. IV, *infra*.

Petitioners' so-called "contradiction" of the decision below with *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (hereafter *Bildisco*), is disingenuous. *Bildisco* acknowledged the propriety of judicial estimation of contingent and unliquidated claims; all the Fifth Circuit did was apply *Bildisco*, saying that such estimation results in a claim which is limited by the exclusion of damages for those times when the claim would not have been otherwise recoverable due to the employer's financial collapse. *Bildisco* did not involve such a factual twist, and no appellate decision has held contrary to the Fifth Circuit on this issue.

Petitioners' best effort to claim a conflict with any aspect of the decision below rests upon *In re U.S. Truck Co.*, 89 B.R. 618 (E.D. Mich. 1988), *aff'g* 74 B.R. 515 (Bankr. E.D. Mich. 1987). Even if it were appropriate for this Court to deal with a "split of authority" between the Fifth Circuit and one district court, there is no such split here. The cases are factually distinct. The district court in *U.S. Truck* said that "the court cannot say what would have happened had the company decided to liquidate," *Id.* at 626, while the bankruptcy judge here specifically found that Continental would have ceased to operate between the petition date and January 30, 1984. Res. App. A. at 30A. All the Fifth Circuit did was to remand to the fact-finder for a further specification as to that precise date; no comparable fact pattern existed in *U.S. Truck*.[8/]

8/ The only decision since the Fifth Circuit's decision in this case holds, citing the Fifth Circuit, that "Damages, if any, would only be available for the time that Roth American would have been able to continue in business." *In re Roth American, Inc.*, 120 B.R. 356, 360 (Bankr. M.D. Pa. 1990).

II. BOTH SETTLEMENTS OF CLAIMS AND PASSAGE OF A NEW STATUTE DRAMATICALLY DIMINISH THE IMPORTANCE OF THIS CASE

Petitioners neglect to discuss two factors which dramatically reduce the practical importance of this case.

Petitioners allege that the decision below "deprives more than 450 Continental employees of their sole remedy for Continental's breach of its labor contracts" and that "the magnitude of the harm in this case alone is sufficient to warrant certiorari review." Pet. at 12. This is not true. Petitioners failed to inform the Court that, on November 26, 1991, the Delaware Bankruptcy Court approved a settlement between Continental and the O'Neill Group which allowed individual pilots and flight attendants to settle their contract rejection damage claims. (The bankruptcy court's Order Approving O'Neill Group Settlement is reproduced at Appendix B hereto). As a result of that settlement 305 of the approximately 435 pilot Petitioners here elected to settle such claims. All 17 of the flight attendant members of the O'Neill Group agreed to settle. Petitioners also failed to inform the Court that an additional 78 pilot Petitioners agreed to settle their contract rejection claims pursuant to Continental's 1985 settlement with ALPA. Thus, there are now only 52 hold-outs who would receive any benefit from even a total reversal of the decision below.[9/]

Moreover, the legal framework for resolving collective bargaining agreement rejection issues has changed

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9/ Moreover, all of the Petitioners with live claims were on strike subsequent to October 1, 1983, and thus would only be eligible for six days of damages (September 24, 1983 through September 30, 1983) if the Court were to reverse the business cessation orders but affirm the strike order.

dramatically since this case was filed in September 1983. In all Chapter 11 bankruptcy cases filed after July 10, 1984, Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, governs assumption and rejection of collective bargaining agreements. Were Continental's petition to be filed today, its collective bargaining agreements would remain in effect until the bankruptcy court ruled on the company's petition to reject the agreements or until such time as the court, after notice and a hearing, authorized adoption of interim work rules. 11 U.S.C. § 1113(e). No longer is it the case that, as here, "the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again." *Bildisco,* 465 U.S. at 532.

Although the claims provisions in Bankruptcy Code Section 502 were not directly affected by Section 1113, the chances that such claims will occur has been diminished. The legislative history of Subtitle J of H.R. 5174 (P.L. 98-353), codified as 11 U.S.C. § 1113, reflects Congress' view that the new provision would help to avoid rejection of collective bargaining agreements in Chapter 11 proceedings, thus obviating Section 502 claims for breach of such an agreement.[10/] Section 1113 was intended to promote bargaining for new agreements between debtors and their unions and thus to diminish the instances in which a contract is rejected or acrimony causes a lengthy strike against a

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10/ *See e.g.*, 130 Cong. Rec. No. 92 (June 29, 1984), at H 7489 (Mr. Rodino: "The provision ensures that a process of negotiation will take place between the employer and union in a reorganization case before the hearing for rejection of the collective bargaining agreement is commenced."), at S 8891 (Sen. Hatch: "Only if these good faith negotiations fail does the court get involved in granting an application to reject a contract."), and at S 8898 (Sen. Kennedy: "[Section 1113 is intended] to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process.").

financially distressed debtor. Congress, in short, enacted Section 1113 in an effort to substitute negotiated resolutions for such strikes as the lengthy ALPA/UFA strikes against Continental.

III. THE DENIAL OF PETITIONERS' CLAIMS TURNED ON FACTUAL ISSUES, NOT QUESTIONS OF LAW APPROPRIATE FOR THIS COURT'S RESOLUTION

The O'Neill Group's strike-related claims (Pet. at 8-14) founder because of two factual shortcomings. First, Petitioners are unable to point to any provision of their collective bargaining agreements which would support a claim for pay during any period they were on strike. Thus, they lack a factual prerequisite for a claim for wages allegedly lost during that time period. Second, Petitioners are collaterally estopped from claiming that they weren't on strike, but had been constructively discharged by the bankruptcy court's unappealed finding that the strikers were *not* constructively discharged.[11/] In short, the courts below found no terms of Continental's collective bargaining agreements with either ALPA or UFA which displaced or modified the legal doctrine that an employee who withholds his labor is entitled to no compensation for the time he is on strike, and the courts

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11/ The bankruptcy court expressly held that Continental made "strenuous efforts to get the pilots to return to work" after filing its bankruptcy petition and that this effort "refutes the constructive discharge claim." *In re Continental Airlines Corp.*, 57 B.R. 845, 851 (Bankr. S.D. Tex. 1985). The court specifically rejected the "suggestion that rejection of the contracts alone gives rise to a claim for wrongful discharge damages." *Id.* at 852. Petitioners, belatedly recognizing the difficulty these factual findings create for their case, disingenuously seek in fn. 6 to argue there was no such factual finding or that somehow an *ex parte* letter written in a non-adversarial context by an official at the Department of Labor can overturn the findings of the bankruptcy court.

below specifically rejected petitioners' argument that they were constructively discharged.

The O'Neill Group's argument (Pet. at 14-22) that employee claims should have continued accruing even after Continental would have ceased doing business and ceased to employ anyone is similarly undercut by factual shortcomings. As this Court has held, collective bargaining agreements typically only prescribe wages and conditions of employment and do not guarantee future employment. *See, e.g., J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944). Here, because there was no employment contract guaranteeing employment, the Court of Appeals directed the bankruptcy court to calculate the *amount* of the employee claims *under this contract,* taking into account the point in time at which the bankruptcy judge, with his extensive knowledge of the debtor's financial affairs, estimated that the debtor would have ceased doing business and therefore would have had no jobs for petitioners.

Such estimation or liquidation of claims is inherent to the claims administration process. Estimation of the value of future claims is inherently factual and often imprecise, even speculative. *See, e.g.,* 3 Collier on Bankruptcy ¶ 502.02 (15th ed. 1992) ("virtually all matters involving the allowability of claims and their right therefore to share in the assets of the debtor ordinarily will be determined by the bankruptcy judge, generally exclusive of all other courts").

IV. THE DECISION BELOW CORRECTLY APPLIED THE LAW

The rejection of Continental's collective bargaining agreements was governed by Bankruptcy Code Section 365. Prior to enactment of Section 1113 to deal specifically with rejection of collective bargaining agreements, Section 365 permitted employers in bankruptcy to reject collective

bargaining agreements and set new employment terms. Claims of employees resulting from such rejection, as this court held in *NLRB v. Bildisco & Bildisco*, 465 U.S. at 530, are treated as claims to be administered by the bankruptcy court under Bankruptcy Code Section 502. Section 502(b)(1), ignored by petitioners, provides for disallowance of any claim "unenforceable against the debtor...under any agreement or applicable law...."[12/] In other words, Section 502(b)(1) permits a debtor to assert any defense to a bankruptcy claim that it would have been able to assert outside of bankruptcy. *See Mazirow v. Grigsby (In re White Motor Corp.)*, 44 B.R. 563, 569 (N.D. Ohio 1984); *In re Nuisance Corp.*, 17 B.R.

12/ Together and separately, petitioners' legal positions -- that they should be paid wage-based damages during the time when they voluntarily refused to work and that they should be paid wage-based damages beyond the point at which Continental would have ceased to do business -- would seriously undermine basic bankruptcy and labor law policies. It is widely accepted that non-bankruptcy entitlements and defenses should be mirrored in bankruptcy processes. *See generally* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857 (1982). Were this not the case, those whose entitlements would be enhanced in bankruptcy would be encouraged to engage in strategic behavior designed to force the debtor into bankruptcy.

Specifically, claimants who think they will receive Section 502 claims for time periods when they are on strike or would have had no employment, even though outside bankruptcy they would not be paid for this time, would press wage demands to the point where their employer would enter the bankruptcy process. In theory, therefore, "bankruptcy law should mirror the rights established by labor law by enforcing them as they exist or by respecting their relative value." Thomas H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard Univ. Press (1986) at 112. The Fifth Circuit's decision accomplishes exactly the theoretically correct result on both issues by denying the unions claims in bankruptcy which were unavailable outside bankruptcy.

80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy, ¶ 502.02 at 502-24,-25,-27 (15th ed. 1992).[13/]

A. Strikers Are Not Entitled To Claim Wages For Periods When They Struck Their Employer.

As the Fifth Circuit held, the applicable law under which to evaluate Petitioners' claims includes federal labor law, here the Railway Labor Act. Judge Gee, applying an unbroken line of cases denying backpay to strikers under the federal labor laws,[14/] correctly concluded that these strikers should be treated no differently than striking employees would be treated had Continental not filed for bankruptcy. Strikers, by definition performing no work for their employer, would not be entitled outside bankruptcy to claim wages for the strike period, even under the provisions of the labor laws which guarantee the right to strike and which establish remedies for employer violations of these laws.

While petitioners allege the Railway Labor Act guarantees the "right to strike," they find no cases which

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13/ *See also In re Continental Airlines Corp.*, 50 B.R. 342, 353 (S.D. Tex. 1985), *aff'd*, 790 F.2d 35 (5th Cir. 1986) (whether a "right to payment" exists under 11 U.S.C. §101(4) is determined by law governing transaction); *In re Altair Airlines, Inc.*, 727 F.2d 88, 90 (3d Cir. 1984) (same).

14/ *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 n.7 (1941); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1303 (5th Cir. 1970); *J.H. Rutter-Rex Mfg. Co. v. NLRB*, 399 F.2d 356, 361 (5th Cir. 1968), *rev'd on other grounds*, 396 U.S. 258 (1969); *Comfort, Inc.*, 152 N.L.R.B. 1074, 1090 (1965), *enforced*, 365 F.2d 867 (8th Cir. 1966). The principle applies equally under the Railway Labor Act. *See National Airlines, Inc. v. IAM*, 416 F.2d 998, 1007 (5th Cir. 1969), *after remand*, 430 F.2d 957 (5th Cir. 1970); *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100*, 690 F.2d 838 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983).

order pay to strikers as though they had been working. This is because the "right to strike" is nothing more than the employee's right to withhold his or her labor in an effort to apply economic pressure to the employer; it does not include the right to be paid for the time when the employee did no work.

The Fifth Circuit majority was correct in applying federal labor law. A contract under the Railway Labor Act, like a contract under the National Labor Relations Act, "is a federal contract and is therefore governed and enforceable by federal law, in federal courts." *IAM v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963). This Court long ago held that collective bargaining agreements and claims arising from breach of such agreements are a matter of special federal common law, not of state law. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957). There is no authority to indicate that, in the interpretation of this special federal common law, any court has thought workers should be paid for not working. Indeed, this Court has held that employers are entitled to permanently replace economic strikers without paying back wages to the strikers if they return, *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and that an employer may lock out its employees under some circumstances without incurring a wage obligation to them. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). It would be strange indeed for the law to deny such economic weapons (or effectively preclude their use by requiring that wages be paid to strikers as well as working employees) only to employers so economically distressed that they seek refuge under the Bankruptcy Code.[15/]

15/ The O'Neill Group suggests that the decisions below provide a debtor-in-possession employer with an incentive to make drastic change in wages and working conditions in hopes of encouraging a strike while

(continued...)

Petitioners' argument that the Fifth Circuit's "reliance on unfair labor practice cases to support its opinion is misplaced" (Pet. at 13) is a tacit concession that disallowance of damages to strikers accords with labor law principles. Petitioners therefore turn to arguing (1) that contract rather than labor law should apply with respect to the strikers' claims, or (2) that this is a special case involving "severe and pervasive" changes made by the emergency work rules approved by the bankruptcy court. Pet. at 13-14. Neither argument has merit.

Petitioners fare no better under a correct application of contract law than under the labor laws they find so unhelpful. Judge Garwood's dissent, even if correct in applying contract rather than labor law, erred in its contract analysis.[16/] Far from providing a "windfall" to Continental, the majority simply placed the parties in the position they would have been in absent the strike by the employees. Under contract law, where, as here, there is no constructive discharge, failure to work for reduced wages terminates the

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15/(...continued)
avoiding liability for contract rejection damages. Even before the 1984 amendments to the Bankruptcy Code, an employer could not make any change to a collective bargaining agreement without ultimately obtaining bankruptcy court approval. *Bildisco*, 465 U.S. at 526-27. The 1984 amendments imposed additional obstacles to such changes. *See* 11 U.S.C. § 1113; *see supra* at 9-10. Moreover, it is specious to contend that an employer who wishes to remain in business would adopt the strategy the O'Neill Group posits. A strike would additionally jeopardize the ability of an already financially vulnerable debtor to stay in business. A debtor-in-possession employer has every reason to avoid and no reason to encourage a strike.

16/ With all due respect, we fail to see how Continental obtained any "windfall" from the ruling below; Continental paid nonstriking employees for the work which striking employees refused to do, and was willing at all times to accept the strikers back into the workforce.

employee's claim to wages for the time when services were withheld. Here the bankruptcy court expressly held, in an order which was not appealed, that Continental's rejection of its collective bargaining agreements did *not* constitute a constructive discharge. *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D. Tex. 1985). Continental received no "windfall;" it was forced to recruit, train, and pay substitute labor to perform services.

B. Employees Are Not Entitled To Damages For Future Wages For Time Periods After The Employer Would Have Ceased To Do Business Had It Paid Such Wages

The Fifth Circuit was likewise correct in its unanimous decision to limit damages for future wages to the period of time when the debtor would have remained in business, for cessation of Continental's business would have resulted in every employee being terminated. Employees working under a collective bargaining agreement which does not guarantee future employment are not entitled to lost future wages. *J.I. Case Co. v. NLRB*, 321 U.S. at 335. When a nonbreaching party cannot demonstrate that it would have suffered losses from the breach, it is entitled to only nominal damages. *IBEW v. A-1 Electrical Serv.*, 535 F.2d 1, 3 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976). In short, the Fifth Circuit's logic was impeccable: (1) as of some date between the petition and January 30, 1984, Continental would have ceased operating had it not rejected its labor contracts, (2) if this happened, no members of the O'Neill Group would have had jobs, and (3) therefore, without any jobs or contractual guarantees of jobs, the O'Neill Group members suffered no damages from the rejection of the collective bargaining agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO.

IN RE:

83-04019-H2-5

CONTINENTAL AIRLINES CORPORATION
DEBTOR

IN RE:

83-04020-H1-5

CONTINENTAL AIRLINES, INC.
DEBTOR

IN RE:

83-04021-H3-5

TEXAS INTERNATIONAL AIRLINES, INC.
DEBTOR

IN RE:

83-04022-H3-5

TXIA HOLDINGS CORPORATION
DEBTOR

CONSOLIDATED CASE NO.

83-04019-H2-5

August 17, 1984

MEMORANDUM OF AUTHORITIES
AUTHORIZING REJECTION OF AIRLINE PILOTS
ASSOCIATION COLLECTIVE BARGAINING AGREEMENTS

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On September 24, 1983, Continental Airlines Corporation ("CAC"), Continental Air Lines, Inc. ("CAL"), Texas International Airlines, Inc. ("TXI") and TXIA Holdings Corporation (collectively "Continental") filed simultaneous Chapter 11 proceedings under Title 11 of the United States Code. On the 27th day of September, 1983, Continental filed a motion to reject the collective bargaining agreements with the Airlines Pilots Association ("ALPA"), the Union of Flight Attendants ("UFA"), the International Association of Machinist and Aerospace Workers ("IAM"), and the Transport Workers Union ("TWU").

On the 11th day of October, 1983, the unions filed a joint motion to dismiss the Continental Chapter 11 proceedings on the ground that the proceedings were not filed in good faith; alleging that the sole or the primary purpose of Continental in filing its proceedings was to reject the union contracts. After an extensive hearing, this court denied the joint motion to dismiss.

By agreement of the parties, the evidence introduced at the hearing on the motion to dismiss was included in the record on the motion to reject the employee agreements. The court adheres to the findings made in that decision.

The taking of evidence on the motion to reject commenced on January 30, 1984. This was over four months after these proceedings were filed but was the earliest this court's calendar would permit it to undertake this lengthy hearing. With some interruptions, the presentation of evidence continued until April 27, 1984. At the conclusion of the debtor's evidence, the court took under advisement the motion of the TWU to enter judgment denying rejection of the collective bargaining agreements with the Transport Workers Union. In addition, to some extent, the question of rejection of the various agreements with the IAM is being treated

separately. The court has not yet issued a ruling with respect to the UFA agreements.

Continental shut down its domestic operations at filing but restarted them on a substantially reduced basis on September 27, 1984.

Immediately upon the filing of this proceeding on September 24, 1983, Continental Airlines implemented "Emergency Work Rules" with respect to each of the four involved unions. These constituted unilateral changes in pay, benefits, work rules and conditions. On or about that date, Continental transmitted copies of the emergency work rules to each union by a letter indicating that these emergency work rules were just that and that they also constituted an offer to each of the unions to negotiate a new agreement. These cover letters refer to the fact that certain issues were omitted from the provisions in the rules. After receipt of these emergency work rules, ALPA and UFA went on strike (beginning October 1, 1983) without undertaking any negotiations with Continental over the emergency work rules or any new agreement based on Continental's then-existing status. Both of these unions have been on strike since that date; although a number of negotiating sessions have since take place.

The IAM and Continental had already bargained to an impasse, which was declared effective July 13, 1983. On August 13, 1983, the IAM went on strike; whereupon Continental Airlines implemented "*Interim* Work Rules" which were subsequently amended on September 12, 1983. These interim work rules were replaced on September 24, 1983, by the emergency work rules applicable to the remaining IAM employees of Continental.

For the reasons set forth below, this court has determined that the equities favor the debtor and its estate,

that the contracts with the Airline Pilot Association are onerous and burdensome and that such agreements must be rejected in order for Continental to have an effective reorganization. This rejection is pursuant to the provisions of 11 U.S.C. §365 and under the principles enunciated in the case of *NLRB v. Bildisco and Bildisco,* 104 S. Ct. 1188 (1984) decided February 22, 1984, during the evidentiary presentation in this case. That case was decided under the National Labor Relations Act. This court determines that the same reasoning and rationale are applicable to this case, which is decided under the Bankruptcy Code and the Railway Labor Act, 45 U.S.C. 151, et seq.

FACTS

Effective in 1978, the United States Congress, in its wisdom, determined that the airline industry should be deregulated to promote greater competition with respect to routes and fares, to allow more ready access of new entrants into the industry and to add flexibility of all airlines to enter new and existing markets and to charge what the traffic would bear, so to speak. Congress took this action despite the protests of the existing airlines, ALPA, the IAM, and other interested parties, who predicted that deregulation would result in financial difficulty for many of the carriers and bankruptcy or mergers for *some* and that this would cause displacement of many employees.

The aims and goals of the U.S. Congress in deregulating the airline industry appear to have been realized. Airfares have decreased dramatically in areas where the particular airline involved has not had substantial control over the market. Many new airline companies have entered into the marketplace and now compete directly with Continental Airlines and the other airlines in the industry. In order to offset this increasing competition, Continental sought to

increase its marketing efficiency by resorting to a "hub and spoke" operation; utilizing Denver and Houston as its operational hubs. While this has had some substantial beneficial effect on Continental's operations, this benefit was not sufficient to offset the fare advantages resulting from lower labor costs enjoyed by the new entrants in Continental's market. The lower labor cost of these new entrants resulted from the lack of historically based labor agreements which had escalated during the regulated period, before 1978, when the airlines could pass these increased costs on to the consumer. In this regulated atmosphere of the airline industry pre-1978, the self preservation instincts of the carriers were mitigated against and they thus did not have adequate incentive to resist the persistent and determined negotiating techniques of the powerful unions in the airline industry, such as ALPA and the IAM.

These unions have historically (and effectively) used the last highest contract as a stepping stone for each new negotiation. The result has been higher and higher wage rates and better and better provisions for the employees relating to work terms. There is no question that these unions did an outstanding job on behalf of their membership in this regard. This trend of higher and higher labor costs (negotiated by these unions) continued even after deregulation by virtue of these same techniques. No doubt upward inflation during this same time was a factor in these negotiations. The result, however, was a complex system of work rules which operated less and less efficiently for the airlines but which generated more and more time off and higher pay for the members of these unions. The additional and more unfortunate result was that it made a high and inflexible labor cost system for the major carriers coming out from the nurture of regulation. This caused many of them to be less competitive with the new entrants who were making increasing incursions into their markets.

This was particularly true of Continental Airlines, whose hub systems in Denver and (particularly) in Houston competed directly with many of these new entrants. Not being fettered with the expensive and inefficient collective bargaining agreements of the older airlines, these new entrants[1] could hire pilots, mechanics, and flight attendants in the open labor market at substantially lower prices than those that had been negotiated by Continental's labor unions. Labor is a major factor in the cost of operating an airline and is one in which there can be material variances from airline to airline. These new entrants could charge substantially lower fares that the older more established airlines, and their cheaper labor costs gave them a substantial competitive advantage over other airlines, including Continental. Continental did not have substantial control over its markets and does not now.

As a result, Continental lost substantial sums of money after deregulation. Up to September 24, 1983, the date of filing of the Chapter 11 petition, Continental had lost $521,900,000 as follows:

1979	lost $ 27.4 million
1980	lost 76.8 million
1981	lost 138.6 million
1982	lost 119.9 million
1983 to September 24	lost, 159.2 million
	$521.9 million

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[1]Southwest Airlines had not been subject to regulation because it was an intrastate carrier before deregulation. Its labor costs have been traditionally lower. Thus while Southwest is not a "new entrant" in some respects, it is in others, since it has materially expanded its markets since deregulation. Its labor costs have been low, and it has run Continental out of at least one market with its lower fares. It is highly competitive with Continental in other markets. For convenience it will be included within the term "new entrants" in this opinion.

Although there were other factors, the main cause of Continental's losses was, as noted, that its higher labor costs prevented it from effectively competing with the low cost new entrants which have been significantly increasing their activity in Continental's markets. Continental did not have the benefit of some of the advantages enjoyed by some of its larger competitors such as United Airlines and American Airlines.

An expert employed by the Trade Creditors Committee testified that all of the major airlines are seeing "the handwriting on the wall" and are negotiating, or have negotiated, important concessions with their respective labor forces. Some have obtained significant reductions in their labor costs from those stipulated by their existing collective bargaining agreements. It was forecast that unless that major carriers eventually reduced their labor costs to the level of the new entrants, they will not survive.

Continental negotiated from time to time during the year of 1983 attempting to obtain concessions from its various unions.

During its disastrous summer of 1983, and prior to filing its Chapter 11 proceeding, Continental Airlines attempted to negotiate a $60,000,000 cost concession from the Airline Pilots Association (on an annual basis) and sought a $40,000,000 annual concession from the Flight Attendants, $20,000,000 from the International Association of Machinist and an additional $30,000,000 from its other (non-union and managerial) employees.

While the Airline Pilots Association members indicated that they were "players", nevertheless, they never committed to the requested $60,000,000 in cost concessions nor to any other number prior to the filing of the Chapter 11 proceeding. After the filing, ALPA offered concessions of

approximately $30,000,000 on an annual basis, or about half what Continental had indicated it needed from the pilots to break even before the filing of the Chapter 11 proceeding.

After the filing, Continental immediately cut back on a number of its routes and a substantial number of the flights that it had been flying. It shut down the airline from September 24 until September 27, 1983, except that it continued to fly its international routes for fear these lucrative concessions might be lost. Continental was also fearful of the domestic flights being shut down for any longer period. Its position is that it was concerned that it would lose public acceptance and that it might never fly again; at least most certainly not without substantial cost to creditors, shareholders, and all concerned, including employees.

Continental scaled back its cost structure in order to provide high quality service on a fare structure competitive with the new entrants. It appears to have been somewhat successful at this marketing technique to date; although it is not yet known what effect there will be if a full scale fare war should be engaged in by a substantial number of its competition. Nor is it known what the full effect of additional competition will be from carriers now entering the field, including the "New Braniff", which began flying during the spring of 1984 during the evidentiary presentation in this case.

REASONABLE EFFORTS

The Supreme Court in *NLRB v. Bildisco and Bildisco,* supra, (hereinafter "Bildisco") required that before acting on a petition to "modify or reject" a collective bargaining agreement, the bankruptcy court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The purpose of this is to

serve the policies (if not the letter) of the Labor Act.[2] However, the bankruptcy court is not required to determine that the parties have bargained to impasse nor to make any other determination outside the field of its expertise.

The unions assert that the involved principle requires the bankruptcy court to hear evidence and pass on the substantive details of all relevant negotiating sessions. This is part of an effort to show that Continental acted unreasonably in the substance of its proposals to the respective unions. The thrust of this theory is to place the bankruptcy court in the posture of determining that the parties should agree to and in what respect the company offers vary from this standard.

It is precisely this kind of inquiry which this court understands that *Bildisco* (and prior cases) determined that this court should avoid. *Bildisco* pointed out that the national labor policies of avoiding labor strife and encouraging collective bargaining generally require that employees and unions reach their *own* agreements on terms and conditions of employment free from governmental interference. In addition, the Court observed that a determination that the parties have bargained to impasse is one ordinarily made by the National Labor Relations Board and that to involve the bankruptcy court in that kind of determination would divert the bankruptcy court to an area outside its area of expertise. See also *American National Insurance Co. v. NLRB,* 187 F.2d 307, page 310 (5th Cir. 1941), affirmed 343 U.S. 395, page 404 (1952).

The labor agreements with ALPA, UFA & IAM are complex and the resulting cost of virtually each provision is

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[2]In that case it was the National Labor Relations Act ("NLRA") 29 U.S.C. 158 et seq. This case involves the Railway Labor Act ("RLA") 45 U.S.C. 151 et seq.

difficult of ascertainment, partly because it varies substantially with each level of flying operation. Asking this court to pass on the merits of the respective offers would impose on the bankruptcy court a substantial burden in areas far removed from any expertise this court might have.

It is the opinion of this court that it is not intended by the Supreme Court that the bankruptcy court examine the substantive merits of the negotiations to determine whether the parties respective proposals are reasonable but rather only that a genuine effort has been made to reach agreement with the certified representatives of the employees. In the same phrase, the Supreme Court required this court to determine as well that "such efforts are not likely to produce a prompt and satisfactory solution." In other words, if a genuine effort has been made by the debtor to reach agreement and this effort is not likely to produce a prompt solution under all the existing circumstances, the court is authorized to *act* on the debtor's motion to reject. Of course this duty of the debtor to recognize the bargaining representative and to continue bargaining exists both before and after any rejection is permitted.

The *Bildisco* court avoided using the terms "good faith" and "bad faith" bargaining; traditional terms in labor negotiations and labor law. Presumably this was intentional. Perhaps this is an indication that the Supreme Court intends for the Bankruptcy Court to stay out of even *that* area of determination. The "good faith - bad faith" determination is simply a determination of whether or not a party has a desire to reach an agreement at all. It requires *some* assessment of the substantive terms of an offer, as well as the willingness to bargain and the effort to do so. *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir., 1960). However, even a "good faith - bad faith" determination is far less of an intrusion into

the bargaining rights of the parties than a determination of whether the substantive terms of a proposal are "reasonable".

The Supreme Court has noted that great caution should be used in finding bad faith in cases other than wherein there is a "desire not to reach agreement", for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements. *Chicago & Northwestern Railway v. United Transportation Union*, 402 U.S. 570 (1971). The Fifth Circuit has ruled to similar effect in many cases, including *Gulf State Manufacturing, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd in pertinent part 598 F.2d 896 (5th Cir. 1979)(en banc).

In addition to this strong policy against such determinations by a court, the burden on the bankruptcy court to make an inquiry into the reasonableness of the terms of offers (as suggested) would appear to be excessive. This court has allowed this type of evidence in this proceeding because of some of the uncertainties in the law that existed at the time of this hearing. The result has been that the hearing lasted almost three months. No doubt future case law will give the Bankruptcy Courts guidance with respect to this issue as to future hearings on applications to reject collective bargaining agreements.

Be that as it may, this court allowed detailed evidence concerning the substance of numerous bargaining sessions which occurred both before and after the filing of the Chapter 11 petition on September 24, 1983. This was at a great cost of court time and may have consumed as much as half or more of the hearing time. From this evidence, the court concludes (1) that Continental has made considerable and reasonable effort to reach agreement with the unions involved herein for voluntary modification of their respective

bargaining agreements, (2) that Continental has bargained in good faith with respect to those efforts, (3) that no agreement has been reached and (4) that those efforts are not likely to produce a prompt and satisfactory solution. It is the intention of Continental to reach agreement with these employee groups consistent with its current economic situation. It has made numerous attempts to do so.

That Continental continued to urge in its bargaining session that it must maintain its labor cost levels at or about those provided for in the emergency work rules does not constitute bad faith negotiation under all of the circumstances of this case. It is not bad faith for a party to insist on the terms of a proposal and to maintain that posture. "Open mind need not mean a mind without conviction nor need it mean a mind easily swayed by argument." It need not make a proposal or require the making of a concession. *American National Insurance Co. v. NLRB,* supra, page 309.

A party may try to achieve its objectives and need not yield. *NLRB v. Tomco Communication, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978). It may even withdraw an earlier offer, including a tentative agreement on certain provisions, if circumstances change. *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). A position taken in good faith need not be abandoned or compromised. The debtor is entitled to insist on a proposal, however unacceptable to the union, and if the insistence is genuinely and sincerely held it may be maintained even if it procudes a stalemate. *NLRB v. Herman Sausage Co,* 275 F.2d 299 (5th Cir.), rehearing denied 277 F.2d 793 (5th Cir. 1960), see *American National Insurance Co. v. NLRB,* supra, page 309 n.3.

The unions' position that a party must ask for more than it wants in order to meet somewhere in the middle is not

accepted by this court. That was urged as being the traditional method of negotiating. However, the facts in this case show that this is not the traditional situation facing negotiators. This is especially true where, as here, Continental has been in extreme financial difficulty and needed prompt modification of its collective bargaining agreement.

Having just filed a Chapter 11 proceeding and being the first air carrier to attempt to fly through such a proceeding, Continental was in a period of uncertainty and needed the flexibility allowed it by the so called emergency work rules promulgated September 24, 1983, immediately upon filing the proceeding. As noted, Continental substantially cut back on the number of cities it served and the number of flights to the cities it continued to serve. It substantially reduced its work force. At the present time it is facing increasing competition from even additional new entrants coming into the market since the filing of this proceeding. It is just now approaching profitability but may be faced with a fare war in the near future. Under the existing circumstances, Continental's bargaining position appears reasonable to this court. Although it severely cut back the wage levels and liberalized its working rules, it somewhat patterned these after those of other airlines with which it was then in competition. Over half of the union membership in each category has crossed the picket lines and come to work for Continental under the terms of the emergency work rules (eighty percent in the case of Flight Attendants) as have newly hired personnel.[3]

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[3]Some of the jobs subject to the IAM agreements were eliminated because Continental could (and did) contract these services out to third parties at cheaper rates than the IAM contract specified (i.e. cabin cleaners, fuelers, flight kitchen personnel, etc.).

In *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), the Fifth Circuit found that an employer engaged in good faith bargaining even though it insisted on wage decreases. The company was experiencing serious financial problems and lower wages were essential to its survival.

That the proposals submitted by the company were for provisions similar to those agreed to by the same union at other companies is evidence of the employer's good faith. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 405 (1952); *Gulf State Manufacturers v. NLRB.*, supra.

That the unions have not accepted Continental's proposals does not in and of itself mean that they are unreasonable or that they are not attempting to reach agreement with Continental. Indeed, the concessions that are being asked of the pilots, the flight attendants, and others is substantial and greatly affects a standard of living to which many of them have become accustomed. This is a difficult idea to adjust to. Nevertheless, herein, the purposes of the National Labor policy have been well served. Bargaining by the debtor with its unions has been going on for well over a year. No agreements could be reached with the IAM and an impasse was declared. No agreement has been reached with ALPA or UFA.

Prior to September 24, 1983, the terms offered the respective unions were better than those required by the debtor post filing. Yet no agreement could be reached on those terms. Just before filing, Continental made major presentations directly to its employees in order to reach agreement on concessions which this court finds were necessary for it to survive, but the unions (except TWU) did not agree. A great deal of negotiation has taken place since filing. To require further bargaining at this level before

acting on the motions to reject seems to this court to be unrealistic and useless.

Indeed, the failure of the court to act at this stage of the proceeding (two months after the substantial evidentiary hearing concluded) may be impeding eventual agreement. As noted above, the parties have a continuing duty to bargain even after rejection. If agreement is to be reached, it will occur after the issue of the rejection of the agreements has been determined. Perhaps this and the improving income posture of the debtor will allow agreement to be reached in the future.

On the other hand, this court is concerned that the Airline Pilots Association does not intend to reach an agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose pilots are represented by this large and extremely powerful union. It represents pilots throughout the airline industry in the United States. Other carriers are having difficulty in the post-deregulation period and are requesting concessions from their pilots. The obligations of ALPA to its other (non-Continental) members would make it difficult for this union to recommend settlement with Continental to the extent needed by Continental in order to lower its labor cost sufficiently for it to be competitive in its fare levels and to return to profitability. Outside of the courtroom, ALPA has asserted "we must continue to apply whatever pressures are required to preclude New CAL [from] operating profitably. These pressures will include both economic sanctions and all legal action open to us...." In the courtroom, ALPA has verified that its purpose is to shut down Continental. The Airline Pilots Association has made it clear, and has convinced this court, that its *primary* aim is to shut down Continental Airlines.

While ALPA's actions (to the extent they are legal) may be allowed by prevailing labor laws, wherein they are a means to achieve an agreement, it appears to this court that other motives are involved, at least in part. Thus ALPA's actions to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved. ALPA's attitude further seems to be at odds with the spirit and purpose of the Bankruptcy Code.

ALPA has maintained that its three principal areas of concern are (1) preservation of the union as the bargaining representative of Continental's pilots (union security), (2) safety and (3) seniority. It also contends that Continental has bargained unreasonably by failing to agree with ALPA's proposals.

Continental has at all relevant times recognized ALPA as the bargaining representative of its pilots, although it has not honored the "dues checkoff" provision of the collective bargaining agreement since the strike began.

THE "SAFETY" QUESTION

The evidence in this case shows that ALPA has publically indicated that it and its members are vitally concerned with the safety of the public flying on Continental Airlines since the October 1, 1983 strike. The pilots failed to mention that most of the pilots employed by Continental are those off of ALPA's seniority list (i.e., are ALPA pilots). The newly-hired pilots must go through required training and must be qualified. That some may be less experienced does not of itself indicate lack of ability. In addition, the court would note that safety is the responsibility of the Federal Aviation Agency, who must revoke or suspend the certificate

of Continental Airlines should Continental not adhere to the safety standards imposed by this federal agency.

In short, while crying "Safety! Safety!" in the courtroom and to the public, ALPA has failed in its meager attempt to offer evidence that Continental Airlines is unsafe to fly. It has offered almost no evidence of this to this court, and has apparently failed to convince the FAA, in whose jurisdiction and responsibility lies the safety of all airlines, including Continental.

ALPA was singularly unsuccessful in providing a scintilla of evidence to this court that safety is a genuine concern on the part of the pilots or that there is substantial evidence of unsafe conditions on Continental's airplanes.[4]

This court has concluded that ALPA's campaign is simply a scheme designed to further ALPA's efforts to close down Continental Airlines for its own economic purposes. Among other things, this would act as a warning to other carriers who must deal with ALPA at the bargaining table in other areas.

Based on the evidence offered to this court, this promotion by ALPA appears to be a misuse of the labor laws of this country. In any event, the court declines to deny rejection on the basis of ALPA's claim that safety is at stake.

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[4]Were ALPA genuinely concerned over the *public's* interest, it has it, within its power to release some of its striking pilots back to Continental to help fill its pilots needs. Continental has requested this. It would have prevented further erosion of Continental's seniority list - an issue in the settlement negotiations. ALPA is under no obligation to do this but its failure to do so upon request is indicative of the fact that *self* interest is its true motive in this endeavor; not that of the public.

THE SENIORITY ISSUE

Some of the major provisions of the collective bargaining agreements by and between Continental Airlines and the Airline Pilots Association (including the old Texas International agreement with ALPA) relate to seniority. These are very sensitive and important provisions for the pilot employees (as well as the other union employees with respect to their respective collective bargaining agreements). ALPA and the other unions argue that Continental Airlines has not been reasonable in its efforts to settle because of Continental's position with respect to the relative position of "new hires" that have been employed since the pendency of this proceeding and after the strikes of Continental's major unions, including ALPA.

The unions further argue that the seniority provision of the contract is a non-executory right which has become "vested" in the pilots and therefore cannot be rejected under the provisions of §365 of the Bankruptcy Code. This court disagrees.

There is no precise definition of "executory contract" in the Bankruptcy Code. At least one of the accepted definitions of the term "executory contract" is a contract that is so far unperformed on both sides that the failure of either party to complete performance would constitute a material breach excusing further performance of the other. *Matter of Tonry*, 724 F.2d 467 at page 468 (5th Cir. 1984). See *Countrymen, Executory Contracts and Bankruptcy*, 57 Minn. L. Rev. 439 (1973); 58 Minn. L. R. 479 (1974) and House Report No. 95-595, page 347 (1977); Senate No. 989, 2d Sess. 58 (1978), 2 Collier on Bankruptcy §365.02 (1983).

Even though a pilot may have achieved a certain level of seniority within the meaning and under terms of the

collective bargaining agreement between ALPA and Continental, nevertheless, the right of employment at Continental by any particular pilot is not absolute. In order to enjoy the use and benefit of any seniority position, the pilot must be employed by, and perform services for, Continental Airlines. It is therefore clear that under the collective bargaining agreement both Continental and each employed pilot have reciprocal obligations during the life of the contract. In other words, performance is due by both parties. This is likewise true for every other employee that has seniority under a collective bargaining agreement. Thus, under the Bankruptcy Code, such a provision is executory, at least insofar as the right of a striking pilot to return to work after the strike is settled.

Under Continental - ALPA collective bargaining agreements, pilots were entitled to be placed on the seniority list and to maintain their relative status thereon (absent other agreement) under the terms and conditions of the agreement. As a pilot went higher on the seniority list, he had the privilege of being recalled, or his employment maintained, in priority to pilots lower on the seniority list. In addition, as changes were made in the system such as routes, equipment, bid runs, vacations, etc., the higher the seniority the higher the priority for the pilot to have his choice in these areas. Furloughs were made from the bottom of the seniority list. Further, after pilots are furloughed, under the agreement they were recalled in order of seniority. Often this required extensive retraining by Continental, wherein a pilot changed type of equipment or was out of service beyond a specified amount of time.

When Continental filed its proceeding and drastically cut back on the number of cities it served and the routes it was flying to the remaining cities, Continental had to furlough a number of pilots on the payroll. Continental immediately

went on a campaign to get the remaining pilots to agree to fly under the emergency work rules. Once the strike began on October 1, 1983, Continental maintained a telephone "bank" in which pilots were called and requested to fly for Continental notwithstanding the strike. Those that did return to work filled the positions then available and, once recalled, maintained their relative priority they enjoyed on the seniority list pre-petition. Therefore, the relative seniority of working pilots is not the issue as this seniority is being honored by Continental.

For a period of time after the strike, Continental attempted without success to reach agreement with ALPA on the terms of a new collective bargaining agreement. As the early initial chaotic days of filing passed and Continental began to rebuild its system, Continental needed additional pilots and made a strenuous effort to get striking pilots to return to service. There was some success in this area, but as Continental expanded its routes it was unable to fill out its list of needs from the ALPA pilots then on strike. By instructions from its chief operating officer, Continental delayed hiring pilots not on the seniority list ("new hires") until it felt it had to do so to service its re-expanding route system. Continental did not undertake employing new hires (pilots off their existing seniority list) without adequate warning to the Airline Pilots Association and its membership. ALPA was told on October 5, 1983, that replacements would be hired if the strike was not over quickly, and Continental sent letters to this effect to all of its pilots. Continental told all of its active pilots that it would not displace working pilots in the future to accommodate returning strikers. Striking pilots had the opportunity to return to work with Continental as it expanded its operations, but many declined to do so, although more than 50% of its pre-petition pilots did return to work.

After Continental reached the conclusion that it had to employ new hires, and began doing so in early November, 1983, it advised these new pilots that they were permanent and would not be replaced by striking pilots returning to work at Continental after the strike ended or upon each striking pilot's individual decision to cross the picket line. That permanent replacements would be hired if the striking pilots would not return was well know to ALPA and its membership long before Continental undertook this practice. Subsequently, since early November, 1983, as pilot positions were available in the system, Continental has hired all pilots off the seniority list who were willing to return (which pilots have continued to enjoy their relative seniority position) and has hired new pilots from outside its seniority list. As noted, once employed, the seniority system has functioned for each pilot as it did before the filing of these proceedings. Had Continental not employed pilots who were not on its seniority list the airline would have had to significantly limit its operations. This would have served ALPA's purposes but it would have made Continental's ability to reorganize substantially less likely. It was necessary to hire these replacements in order for Continental to discharge its duty to the public to make a reasonable effort to continue flying. However, in efforts to negotiate a settlement, ALPA has pointed its finger at Continental for refusing to agree on a "back to work" agreement under which the striking pilots would return to work and would resume their old relative seniority positions ahead of any newly-hired pilots (who would naturally have lower seniority status in most, if not all, situations). Such an agreement would result in Continental's furloughing most, if not all, of these new hires, despite express promises to these individuals that they would not do this. ALPA says that Continental, by not so agreeing is bargaining in bad faith and/or is unreasonable.

Continental has maintained that it will take returning pilots only to the extent that positions are (or become) available and will not agree to "create" positions for returning strikers by furloughing new hires.

Continental defends its position by urging to the court that it has a legal obligation (the oral representations and agreement) to the individual new hires as well as a moral obligation. Continental further argues that if it agreed as ALPA has suggested, the resulting furloughs of the new hires would put Continental in a bad bargaining position with respect to any future negotiations that might take place between ALPA and Continental within the next several years. Continental argues that its position does not constitute bad faith bargaining and is entirely reasonable under the circumstances.

Should an agreement be reached with ALPA, it is doubtful that it would extend beyond a one or two-year period, as has been customary between these parties. Many of these new hires left, or declined to accept, other employment positions when they came to work for Continental. It would appear that they have relied upon Continental's representations. If Continental replaces these permanent new hires despite its representation to the contrary, Continental might well be at the mercy of ALPA at the end of any new contract term because of its potential inability to employ replacement pilots should ALPA then undertake a new strike. Continental would have effectively lost credibility with the pilot community in this country, risking the probability that it could not hire replacement pilots in the event of any future strike threat. For Continental to agree as ALPA suggests would place a powerful negotiating weapon in ALPA's hands with respect to future negotiations. In this court's opinion, given all of the circumstances of this case, Continental has valid reason to be concerned over the use of

such weapons by ALPA. In all probability, Continental will not have *completed* any reorganization process within the next two, three nor even five years.[5] The resulting leverage to ALPA could place in jeopardy any confirmed plan of arrangement.

The strong public right of the worker to engage in a legal strike must be observed. However, the working pilots (including those not on the pre-petition seniority list) and the other working employees have done what they can to preserve the value of the debtor for the benefit of all. Once-successful reorganization is achieved or is foreseeable, can the striking employee be heard to claim that Continental is unreasonable in not agreeing that the striking employee may return to work whether a position is available or not and demand his or her former seniority status as a legal right, when it results in the new hire being furloughed?

This court cannot agree that a policy such as ALPA suggests would be in the best interest of the reorganization process.

Although any "legal" and/or "moral" obligation of Continental to the new hires is an important factor, in this court's view there is a much stronger reason for sustaining Continental's position that these needed new hires are now permanent employees and that they should not be replaced by Continental to create positions for returning striking pilots as part of any back-to-work agreement. These reasons are the public policy of keeping the air carrier flying (as provided in the Interstate Commerce Act and in the Railway Labor Act) and in the equally important public consideration and policy

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[5]By this is meant the completion of any payout period provided for in a confirmed plan of arrangement. It is not unusual for such pay periods to extend beyond three or even five years.

of the Bankruptcy Code that a financially troubled company make the highest and best use of its assets and facilities in order to maximize the recovery to creditors and to preserve the business operation for the economy of the country. It is not the least of such policy that it promotes the preservation of this particular job market.

The striking pilots made a choice, although it was no doubt was a hard choice. When one makes a choice, it is not always possible to continue to retain both options, and in fact usually this is not the case. When great principles conflict, a court must attempt to determine what the best overall public policy must be under the circumstances. These striking pilots made their decision knowing the potential consequences. They were aware that Continental was asking them to return, that Continental needed pilots to expand its operations, a necessary step if it was to have a successful reorganization, and that Continental was going to hire replacement pilots on a permanent basis if they did not return, and that Continental would not voluntarily allow displacement of these persons who accepted employment under extremely troubling circumstances.

A reorganizing debtor must be efficient in its employment practices, since its ability to survive is at stake. It would not be consistent with the overall purposes of the Railway Labor Act and/or the Bankruptcy Code to thusly penalize the new hire after he has been successful in assisting the debtor to return to profitability.

Certainly Continental needed to give assurance to these new hires that they would not be replaced when the strike was over. No one knew how long the strike might last. This emphasizes (and is consistent with) the strong public policy of the Railway Labor Act to keep the carrier in operation. When you couple this public policy with the

circumstances that the carrier in this instance was in a weak financial condition, one must conclude that while the union is free to use self-help under labor law, the debtor likewise had the right to use self-help as Continental did here. There is legal precedent for the position taken by Continental. *Empresa Equatoriana De Aviacion v. District Lodge,* 690 F.2d 838, (8th Cir. 1982); *National Airlines, Inc. v. International Association of Machinists and Aerospace Workers, et al,* 416 F.2d 998 (CA 5, 1969) cert. denied, 400 U.S. 992 (1971); *Flight Engineers International Association v. Eastern Airlines, Inc.,* 359 F.2d 303 (2nd Cir. 1966); *International Association of Machinists v. Central Airlines, Inc.,* 355 S.W.2d 803 (Civ. App. Texas, 1962) *cert. denied,* 371 U.S. 934 (1962), *reh'g denied,* 371 U.S. 970 (1963).

In the case of *Flight Engineers International Assoc. v. Eastern Airlines, Inc.,* supra, ALPA itself successfully espoused the position that its members should permanently replace striking flight engineers.

In *National Airlines, Inc.,* supra, page 100¢, the court stated: "Under both the N.L.R.A. and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. The hiring of replacements for the strikers would have been consistent with the attempt to restore service." In *Empresa Equatoriana,* supra, the court stated on page 846 that "the carrier could replace strikers where necessary to its operation." On page 847 it said: "The strikers who were properly replaced are entitled to be placed on such [a preferential hiring] list, to be rehired when their replacements quit or when a similar vacancy arises. Without the hiring preference, the concept of replacement becomes indistinguishable from discharge."

The hiring of permanent replacement employees in a strike situation has been held to be an acceptable practice

under the National Labor Relation Act. In *NLRB v. Mackay Radio and Television Co.*, 304 U.S. 333 (1938), the Supreme Court held that permanent replacements hired in an economic strike need not be terminated to make room for returning strikers. On page 345, the court said it is not "...an unfair labor practice to replace the striking employees with others in an effort to carry on the business" and that an employer is "not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment in order to create places for them." See also *Gulf States Manufacturers, Inc. v. NLRB,* supra, page 1327 and 1328.

To require the debtor to place in effect at this time rules which would cause the termination or furlough of these people who have made a vital contribution to the effort to reorganize, would in this court's opinion, serve as bad precedent for future reorganization cases.

While Continental is free to make the choice of agreeing or not agreeing with ALPA on this point, this court declines to accept ALPA's view that Continental has engaged in unreasonable bargaining (or bad faith) in refusing to accept ALPA's position on this point.

THE STATUS QUO PROVISIONS OF THE RAILWAY LABOR ACT, THE EMERGENCY WORK RULES, AND REJECTION OF THE CONTRACTS AND THEIR TERMS

As noted above, immediately upon filing of its Chapter 11 proceeding on September 24, 1983 Continental unilaterally implemented new wage rates and work rules for each of its union groups, including the pilots. Continental undertook this action notwithstanding that the agreements with the pilots were not then open for negotiation and, further, the

negotiating procedures of Section 6 of the Railway Labor Act had not been exhausted, as specified by the Act ("RLA").

The unions argue that notwithstanding §365 of the Bankruptcy Code, the status quo provisions of the Railway Labor Act prohibit any unilateral change in the wage rates or work rules "on the property" until all negotiations pursuant to the scheme of the status have been exhausted. The Unions, including ALPA, argue that there is a difference between making unilateral changes in a contract which might be rejected under the provisions of §365 of the Bankruptcy Code and the statutory provisions of the RLA, which (they allege) continue the terms of the contracts in effect until the bargaining procedures have been completed. The Unions argue that §365 does not authorize rejection of statutory requirements, as opposed to contractual provisions, i.e. this court cannot authorize changes in the wage rates and work rules of a carrier governed by the RLA until the Section 6 bargaining procedures have been exhausted. ALPA no doubt would concede that such procedure may take years (indeed it has already taken about nine months since filing without effect).

Unquestionably the Railway Labor Act contains "status quo" provisions. As noted by the 5th Circuit in the *United Industrial Workers of the Seafarers International Union of North America v. Board of Trustees of Galveston Wharfs,* 400 F.2d 320, page 329 "the objective of the Railway Labor Act is continuance of the status quo until the statutory procedures of the Act have been exhausted." And "As the Supreme Court stated in *Order of Railway Telegraphers v. Railway Express Agency,* 1943, 321 U.S. 342, 347, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792, the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, leaves the collective agreement in force throughout." The court also noted with approval the language

of *Order of Railway Conductors v. Pitney,* 1946, 326 U.S. 561, to the effect that the object of Section 6 is to maintain the status quo pending the expiration of the period provided by the section for allowing the process of negotiation, mediation and conciliation to have a play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect. The 5th Circuit also noted that the Railway Labor Act is more concerned than the National Labor Relations Act ("NLRA") with continuance of the employers operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved.

Generally speaking, this principle is recognize by virtually all labor law precedents. On the other hand, while the Supreme Court in *Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, ALF-CIO, et al v. Florida East Coast Railway Company,* 384 U.S. 238 (1965), recognized the requirement by law for the railway to abide by all the rates of pay, rules, and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure, the court allowed exceptions "upon specific authorization of [the U.S. District] court after finding a reasonable necessity therefore". The Supreme Court therein recognized that one of the primary purposes of the Railway Labor Act is to keep the carrier operating. On page 246 the court notes "that the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute". In that nonbankruptcy case, the Supreme Court held that under emergency conditions the carrier could implement new terms and conditions governing the labor force as long as those

changes were necessary for the railroad to fulfill its duty to continue operations, provided the power to make such changes is closely confined and is supervised. Thus, the Supreme Court has recognized that the status quo provisions of the Railway Labor Act must, in some instances, bend to the exigencies of the situation.

The evidence in the instant case shows that, had Continental not been able to significantly reduce its labor costs (by the unilateral implementation of less costly and more efficient work rules and pay rates) at the time it filed this proceeding, Continental would have run of cash and would no longer be operating at the present time. It would have had to shut its doors even before this hearing commenced. Continental was simply in no position to continue its operations under the wage rates and working conditions contained in its agreements with the Airline Pilots Association. It did not have the money to do so nor the ability to acquire it. In addition, under the circumstances, Continental could not even have reduced its operations (as it did beginning September 27, 1983) and still have complied with the terms of its agreement with ALPA. Continental reduced them significantly, and it needed the low cost, the efficiency, and the flexibility of its emergency work rules in order to do so.

ALPA's contention cannot be sustained under the law. By virtue of § 1167 of the Bankruptcy Code (11 U.S.C. §1167), the U.S. Congress provided that notwithstanding §365 a debtor-in-possession under Chapter 11 of the Code cannot change the wages or working conditions of employees of a debtor subject to the Railway Labor Act *except* in accordance with Section 6 of such act. Changes in wages working conditions would and are otherwise authorized by §365 of the Bankruptcy Code. The Congress then expressly provided in §103(g) of the Bankruptcy Code that Subchapter IV of

Chapter 11 applies only to a case under such chapter concerning a *railroad. Section 1167 is part of Subchapter IV of Chapter 11.* Continental is not a railroad. Under the statutory scheme thusly set forth Congress, in its wisdom, by clear implication provided that a debtor governed by the Railway Labor Act need not comply with Section 6 of that act before making unilateral changes in wages and work rules if it is in Chapter 11 and is not a railroad. The statutory scheme of the Bankruptcy Code thereby provides for the action taken by Continental in this instance. It might well be noted that the Bankruptcy Code was enacted in 1978, the same year that airline deregulation became effective.

Further, since the contracts are no longer immediately enforceable after filing, the changes in wages and work rules are accomplished not by the employer's unilateral action, but rather *by operation of law. NLRB v. Bildisco & Bildisco,* supra, 104 S. Ct. 1188 at page 1200. In *Bildisco,* the Supreme Court laid down a pragmatic rule in dealing with the National Labor Relations Act. This court is persuaded that the reasoning of the Court in that case is likewise applicable here in relation to the RLA. As noted above, this debtor would not have survived implementation of the suggestion by the Airline Pilots Association that Continental could make no post-filing change in its wage rates and working conditions.

In *Bildisco,* the Court held that the authority of a debtor-in-possession to seek rejection of the collective bargaining agreement was not qualified by the restrictions of Section 8(d) of the NLRA, which section established detailed guidelines for midterm modification of collective bargaining agreements. The Court noted the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. These policies were desperately needed by Continental at filing in order to continue its duties as a carrier. As noted,

performance of this duty to continue public service is one of the primary purposes of the RLA. At least to that extent, the Bankruptcy Code and the RLA are entirely consistent and compatible.

The Supreme Court did not fully accept the "new entity" theory utilized by the Court of Appeals in its Bildisco opinion, 682 F.2d 72 (3rd Cir. 1982), but the Court did observe that the debtor-in-possession, while the same "entity" which existed before the filing of the bankruptcy petition, is nevertheless empowered by the Bankruptcy Code to deal with its contracts and property in a manner that it could not have done absent the bankruptcy filing. The court noted that the fundamental purpose of reorganization is to prevent a debtor from going into liquidation with an attendant loss of jobs and possible misuse of economic resources. The court noted further that recapitalization of a debtor could be jeopardized if the debtor-in-possession was saddled automatically with the debtor's prior collective bargaining agreement. The Bankruptcy Code specifies that the rejection of an executory contract which has not been assumed constitutes a breach of the contract which relates back to the date immediately proceeding the filing of a petition in bankruptcy. 11 U.S.C. §365(g)(1). The court further noted that if the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume, the debtor-in-possession is obligated to pay for the "reasonable value" of those services, which, depending upon the circumstances of the contract may be what is specified in it. Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract *cum onere*.

The Supreme Court concluded that the filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable and may

never be enforceable again. Specifically the Court concluded that after the filing, the collective bargaining agreement is not an enforceable contract within the meaning of NLRA Section 8(d), and that it follows that the debtor-in-possession need not comply with the provisions of Section 8(d) prior to seeking the bankruptcy court's permission to reject the agreement. The court further stated that in a Chapter 11 case the "modification" in the agreement has been accomplished not be the employers unilateral action, but rather by operation of law. The court further noted that even the National Labor Relations Board had conceded in that case that the cumbersome and rigid procedures of Section 8(d) need not be imported into the bankruptcy proceedings. The Supreme Court also held that the debtor-in-possession need not bargain to impasse before seeking rejection and that these provisions of the National Labor Relations Act must be subordinated to the exigencies of bankruptcy.

In this court's opinion, the rationale of the Supreme Court in *Bildisco* is equally applicable to the Railway Labor Act and the status quo provisions of that act must give way to the realities of bankruptcy. A company whose financial life is threatened should not, under rational public policy be forced to adhere to principles which, though of good service in times of ordinary financial health, would, as in this case, jeopardize the company's existence.

The unions' attempt to distinguish *Bildisco* because it dealt with the National Labor Relations Act, whereas Continental is subject to the Railway Labor Act. However, this court is not persuaded that in the situation that Continental now finds itself, there is any persuasive difference from the parameters outlined by the Supreme Court.

If ALPA's argument is followed, the statutory "status quo" provisions of the Railway Labor Act would put

a financially troubled debtor to the task of an arduous (and perhaps impossible) process before it could obtain the economic relief which might well be necessary to its continued operation. The result in many instances, including this one, might well be that liquidation would result unnecessarily while lip service was being given to the alleged purposes of the Railway Labor Act, and many jobs would be unnecessarily lost. Clearly the overriding public policy is that more jobs should be saved under these unfortunate circumstances rather than that higher wages be paid for a short period of time before the debtor's financial heart stops beating. The demise of a company is too much of a price to pay for strict adherence to Section 6 bargaining requirements. Any policy which would tend to precipitate this demise could not truly be consistent with the spirit and purposes of the RLA, much less the Bankruptcy Code.

Once a company is legitimately in Chapter 11, as Continental has been found to be, the provisions of Title 11 and the principles of *Bildisco* are applicable to its collective bargaining agreements even though they are otherwise governed by the RLA. Unilateral changes may be made by the carrier *at filing*, at least where rejection of the agreement is later approved by the court. However, the debtor is still required to make reasonable payment for the services it receives during the pendency of the proceeding and is obligated to bargain with the certified representatives of the employees both before and after rejection.

Continental was the first airline ever to attempt to fly through a Chapter 11 proceeding. Had Continental requested interim relief from the contract wage levels and work rules and had it been possible to have had such a hearing immediately, such relief would have been granted by this court; given the unusual circumstances concerning its cash position, the changes it made in its level of flying, its

competitive situation, and the uncertainties that existed immediately after the filing of this petition.

The fact that other urgent matters were pending on this court's docket prevented it from hearing the evidence on the motion to reject for a few months. When the evidence did begin on January 30, 1984, it extended until April 28, 1984.

It appears to this court that to have required negotiations between the time of filing and the institution of emergency work rules unilaterally imposed by Continental Airlines on its pilots (when operations resumed three days after filing) would not only have required a useless and nonfruitful act (no agreement has been reached nine months later) but would have prevented Continental from resuming domestic operations at that time. Further since rejection is being allowed, had Continental not reduced its wage payments, it would have expended more monies in reliance on the contractual provisions than those necessary to obtain these same services. Continental would have paid more than the reasonable value of these services based on market rates, given all of the circumstances in this case.

Further delays in restricting Continental's flying operations would also have resulted in loss of those advantages it had as a going business. At worst, this could have resulted in the destruction of its business and at best it would have severely diminished its ability to reorganize. In either of these events, it would have stopped payment of wages to all employees for either a longer period or for all time.

RELATIVE EQUITIES

As has been noted, deregulation has caused some difficulty to the industry majors, including Continental. Other

carriers have furloughed employees and many unions have granted concessions to various carriers in light of the increasing competition. Continental has suffered substantial losses since deregulation and now has a substantial debt structure and debt service. This debt service makes it difficult to compare Continental to other airlines in terms of what costs are necessary for it to be profitable.

An effort has been made to show that Continental was solvent when it filed its proceeding and that rejection should not be permitted. The effort to prove solvency stemmed from the appraisal of Continental's air fleet at an amount greater than that shown on its books. In other words, its airplanes have a greater market value than book value. It is axiomatic that for Continental to realize market value from these airplanes they would have to be sold. If they were sold Continental could not operate then. Without airplanes to operate, Continental would have additional obligations from rejections of its numerous leases on ground space and from other executory contracts. Whether the net result, taking all resulting liabilities into account, would show that Continental is solvent is speculative at this time. No effort was made to show this result. Resulting obligations from rejection of executory contracts are not now on the books of Continental as a liability.

At filing, as determined in connection with the motion to dismiss, Continental had reached the point where it no longer had free assets upon which to obtain any credit and certainly could not obtain credit on the basis of its potential profit margin. Further, assuming Continental was in fact solvent, had Continental adhered to the labor costs specified in the respective collective bargaining agreements, Continental would have soon become insolvent unless it ran out of *cash* and had to close its doors before this occurred.

Moreover, if assets were liquidated (even at the best market price) there would be no further need for employees at Continental, including those who would seek to be employed under the collective bargaining agreement. Thus a *sale* of Continental's air fleet would defeat the purposes of such agreements entirely.

Therefore, it seems that for these purposes, a liquidation test for solvency seems foolhardy and a self-defeating way of evaluating Continental, under the circumstances. As a going concern, Continental was losing substantial sums of money. An evaluation of the assets on this basis (capitalized earnings) would not show Continental to be solvent. In addition, at the filing Continental was not paying its debts as they matured.

Unless a company can become profitable and maintain that posture consistently, it is inevitable that it go out of business. If a reorganization proceeding is to succeed, prior accrued indebtedness must be paid out of future profits (unless the company is liquidated). If there is no excess of money over and above operating expenses, there is nothing to pay prior indebtedness with; whether it be secured or unsecured indebtedness, including any damages resulting from rejection of collective bargaining agreements.

The unions have recognized that Continental needs relief from the high labor cost which results from adherence to the respective collective bargaining agreements. Each has indicated in testimony before this court that it would (and/or did) agree to significant concessions in modification of these agreements. (Even the IAM's representative testified that it would - or might back off of its requested "industry standard" wages.)

The non-union employees agreed to their share of relief (by 80% vote). ALPA points out that Continental realized the savings it requested (pre-filing) from the IAM group as a result of the IAM strike and the interim work rules imposed on August 13, 1983 and by contracting out of much of the IAM employee work. The pilots intimate in testimony that they would have agreed to the $60,000,000 requested of them and that Continental should have interpreted their "signals" to mean that they would agree to concessions at that level. The UFA has said it would agree to the $40,000,000 in concessions requested by Continental prefiling (and even more) but that the problem in reaching agreement has been the dispute over the value (UFA's costing) of the concessions offered by UFA. Continental says they are worth far less that the $40,000,000 requested, while UFA says they were worth much more (i.e., $50,000,000). However, the UFA never sent its costing experts to confer with Continental's - so the issue was never resolved. TWU did agree to the concessions requested by Continental pre-filing.

This evidence is indicative of the recognition by these unions that Continental cannot survive under the costs of these agreements as written.

When Continental resumed flying operations September 27, 1983 (after filing its Chapter 11 and being shut down for three days), it severely reduced its fare level on all flights in order to entice the flying public back onto the airline. It also needed to restore the confidence of travel agents who had been "booking away" from Continental as rumors of its financial troubles had grown (pre-filing). This had the desired effect. When it became apparent that the public perceived that Continental could fly through a Chapter 11, Continental increased its fare level but only to the point they were competitive with the low cost airlines flying in competition against them. However, unlike the low-cost

competition, Continental still served hot meals on certain flights, and maintained free baggage handling and interchange with other airlines, a reservation service, and others amenities that are normally associated with a full-service airline. This has been criticized severely by the unions, but it has apparently been successful for Continental. Continental had tried maintaining higher fare levels and full service as a means of competing with the new entrants and had found it to be very unsuccessful.

Continental has implemented this marketing program and has set its fare levels in order to maximize its yield. It is now projecting a profit and has been meeting its projections for the first time in a long time. Taking into consideration all of the existing circumstances, this court concludes that Continental's business plan is reasonable.

The unions point out that the emergency work rules unilaterally imposed by Continental at filing would result in annualized cost savings to Continental far in excess of the $150,000,000 requested just before filing. The unions contend that the annualized savings would be in the area of $250,000,000. It should be noted that the $150,000,000 in concessions was calculated merely for Continental to break even. Further, at the time of the filing of its Chapter 11 proceeding, many uncertainties existed and many changes were taking place within the airline. Continental was cutting back its operations severely for a period of time. It did not intend to return fully to its prefiling level of flying. It was and is facing increasing competition. There is potential for a fare war and skirmishes are even now being fought.

Continental needed the lower costs and flexibility provided by the emergency work rules (or at least substantially so) in order to survive, right itself financially, and progress toward a stable and profit-making posture on a

consistent basis. Substantial sacrifices have been, and are going to be, necessary for this airline to revitalize itself. The current working employees are making that sacrifice. They have recognized that meat and potatoes come first; dessert on the terrace comes later.

Because of the collective bargaining agreements the pilots have enjoyed standards of living that make the required sacrifices hard to adjust to. The court can understand why a pilot making at, near, or over $100,000 per year has set a standard (or cost) of life style that makes adjusting to a salary of $43,000 or less extremely difficult. Small wonder the pilots resist such a change. But economics can be harsh. It has been to the airline industry in general and to Continental in particular. The pilots have managed to negotiate (over the years) pay benefits and work rules which are onerous and non-productive, especially when compared to those of some of the other competitive carriers. The result was a significant cost imbalance and a substantial advantage to much of Continental's competition. In one sense, the pilots had simply priced themselves (and/or Continental) out of the existing market.

The *average* 1982 earnings for Continental captains (excluding TXI pilots) were $89,673 the 94 DC-10 captains salary *averaged* $101,793 in 1982. An analysis by the Economic Analysis and Information Services Department of ALPA concluded on July 28, 1983 that between 1980 and 1982 "pilots average earnings are greater than" the average earnings of accountants, attorneys, college professors, dentists and PH.D chemists and that only doctors earn more than pilots but that pilots salaries were increasing at a faster rate than those of any other profession.

Furthermore, the evidence showed that the actual hard-hour utilization of pilots was less than 60 per month,

pre-petition. Scheduled flying days for pilots in May, 1983 (presented as an example) averaged 14 days for regular DC-10 and 727 pilots on domestic flights. In addition, pilots got substantial vacation time (between 16 and 44 days per year depending on seniority). This vacation time can, at least in part, be used to further reduce scheduled flying time.

Federal Aviation Regulations permit utilization of pilots up to 100 "block hours" in a calendar month, not to exceed 1,000 block hours per year.

It should be noted that traditionally Continental's labor force has historically been over 50% non-union; 6,776 out of 12,008 employees pre-petition and 3,553 out of 5,763 employees post-petition (56.4%) as of January 31, 1984.

As observed above, more than 50% of the currently active employees in each *unionized* job category[6] (and more than 80% of the active flight attendants) have elected to cross their own union's picket lines. This appears to be indicative of these employees' acceptance of the need of Continental for relief from the respective collective bargaining agreements and their willingness to work at the wage levels and under the working conditions (including increased productivity) being currently offered by Continental.

Continental is offering a living wage to its currently flying pilots. In addition, it is offering to its employees a profit-sharing plan guaranteeing each a participation in 25%

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[6]At the time the IAM struck, 12:01 a.m. EDST, August 13, 1983, Continental sold all three of its flight kitchens (at Los Angeles, Denver and Houston) and contracted out this service and that of cabin cleaning and fueling because it could contract this service from third parties substantially cheaper than it could perform them with IAM employees under the terms of the IAM collective bargaining agreement.

of the profits of the airline from the first dollar upward. It has also proposed to this court for approval a stock ownership plan which would make the employees 35% owners of the company on a fully diluted basis. They as a group, would then be the largest shareholder of the company. Overall, morale appears to have increased post-filing to a very high level. As of April, 1984, Continental had grown to approximately 6,000 employees and was projecting 8,000 employees by the year end.

As of April 1, 1984, Continental had 1,070 active pilots, including those currently in training or on leave. Of this number, 494 were new hires and 576 were from its pre-petition seniority list. It employed 1,471 flight attendants, of which 270 were new hires and 1,201 were from its pre-petition seniority list. All of the ground instructors were still on the payroll as were 21 out of the 35 dispatchers (14 dispatchers were still on furlough).

Beginning in October, 1981, Continental management personnel endured a 10% pay cut and non-union employees had to forego scheduled pay increases. In January - February, 1982 personnel department positions were reduced by 35% and general staff levels in other offices were reduced 15%. In 1983, 25% of the remaining management staff jobs and 15% of the line management positions were eliminated. Non-unionized personnel and management were required to work extraordinarily long work hours and even split shifts in some instances. Just prior to the filing of bankruptcy, management employees had a 15% pay cut and reduction in benefits, and, as noted, non-unionized employees voted to accept similar reductions.

It is true that there were "snap back" provisions relating to these management pay cuts, and their salaries have been increased (snapped back) in part already. However,

under the evidence, this court is convinced that Continental management employees are being paid materially less than competitive salaries for top management positions that other companies are paying for similar management skills. In addition, as noted, Continental management personnel have been required to work extraordinarily arduous schedules. Further reduction in their wages could result in loss of key employees, and it appears that Continental has in fact already suffered from this problem.

This court finds that non-union and management personnel have made sufficient sacrifices to justify rejection of the respective union contracts when balancing the rights between them. This is particularly true when you consider the high level of wages and salaries which had been bargained for by the various unions and agreed to by Continental, as set forth in these contracts.

Labor costs, were a major factor contributing to Continental's bankruptcy. If the contracts had not been rejected, the administrative claims resulting from reinstating the contracts (and their resulting high cost) from the date of filing would in and of itself be highly damaging to the prospects of reorganization. Further, if the company is liquidated under Chapter 7, the contracts would be rejected as a matter of law, 11 U.S.C. §365(d), and this rejection would likewise relate back to the date of filing.

Low labor cost are necessary for Continental at the present time and at least for the near term, foreseeable future, in order for Continental to be competitive.

Virtually no effort was made by ALPA to show that Continental could afford to pay materially more to its pilots than it is now doing under the emergency work rules . The only effort was a calculation to show that if Continental raised

its fare levels without losing any of its passenger miles, it could do so. However, no evidence was introduced that convinces this court that if Continental materially raised its fares it would not lose a substantial portion of its flying customers.

There is little loyalty, if any, among passengers. Passenger miles are essentially fungible. Ticket prices remain the single most important element in attracting the flying public.

The court rejects the motion that Continental could materially raise its ticket prices and materially increase its pilots labor costs, unless, and until, its competition also raises ticket prices. That adventure has already been embarked upon by Continental in the past; all to its financial dismay.

It appears to this court that substantial jobs will be preserved as a result of rejection of these contracts. Certainly the creditors are likely to get more under any plan of arrangement than in liquidation; in fact, it is usually necessary for the court to find that they will receive not less than they would under Chapter 7 liquidation before any plan of arrangement can be confirmed. 11 U.S.C. §1129(a)(7). Any such plan must be based on future earnings. From the evidence, it appears that there will be no earnings unless these contracts are rejected. Labor costs are such an important element in Continental's ability to operate profitably and to remain competitive that it cannot offer a plan of arrangement until it knows if the contracts are to be rejected, and, thereby, what its future labor costs are likely to be. The respective contracts must be rejected to get any new capital. No viable business plan can include a return to all of Continental's pre-petition labor costs.

Rejection will no doubt result in reduction in standards of living of many of the employees, and possibly even hardship in certain cases. Nevertheless, under the circumstances and the economics currently prevailing, there appears to be no reasonable alternative.

The unions argue that this court cannot make necessary determinations in order to allow rejection of the contract in light of the fact that Continental has not offered a plan of arrangement, because this court cannot assess the viability of such a plan or the need to reject the contracts as an integral part thereof. This court disagrees. The Supreme Court in *Bildisco* understood the difficulties in assessing the outcome of a potential reorganization in the beginning stages of such a proceeding. At this time the court cannot say that Continental will have a confirmed plan of reorganization, nor even that the confirmed plan will be successful, but it has determined that without rejection no viable plan providing for future operation by Continental of its own air fleet is possible. The Supreme Court noted that "the Bankruptcy Court inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue." I believe that the findings of this court have satisfied this issue as required by *Bildisco* and other cases. In this instance, the inability of the parties to reach an agreement is in itself a deterrent to any plan of arrangement.

There was testimony that Continental could not afford any substantial increase in its current labor costs. A return to pre-petition labor costs under the ALPA contracts would preclude Continental from effective competition with the low cost, new entrants; some of which have negotiated contracts with the very unions which oppose Continental's motion to reject.

The unions argue that if the court allows rejection of the agreements, it should only allow rejection of those parts of the agreements that are burdensome and (presumably) should require affirmation of all other parts. This court has no true way to know the financial impact of each particular provision in the agreements. The Supreme Court in Bildisco noted that the bankruptcy court "need not determine that the parties have bargained to impasse or make *any other determination outside the field of its expertise.*" (Emphasis added).

The ALPA and UFA contracts are extremely complex. This court could not possibly rewrite them for the parties. if it tried to do so, in all likelihood serious mistakes would be made. As noted in the *Bildisco* opinion, the National Labor Policies generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. The court cited *Howard Johnson Company v. Hotel Employees,* 417 U.S. 249 (1974); *NLRB v. Burns Security Services,* 406 U.S. 272, 282-294 (1974). See also *Chicago and Northwestern Railway Company v. United Transportation Union,* 402 U.S. 570, page 579, footnote 11, referring to the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements.

There is no provision in the Bankruptcy Code which would provide for rejection in part. Historical case authority indicates that executory contracts must be accepted *cum onere* or not at all. The Supreme Court in *Bildisco* did not provide for any such authority by this court; especially since the court noted that acceptance *must* be cum onere and cited *In re Italian Cook Oil Corp.,* 190 F.2d 994, 996 (CA 3 1951) for that proposition.

Continental has a continuing duty to bargain with the certified representatives of its employees in good faith. These parties are themselves in a better position to know the effect of the various provisions of their future agreements, which, by their nature, are extremely complex. Should this court impose restrictions or conditions on the rejection of these agreements, the court would not only be involved in an area outside of its expertise but it would violate strong principles of labor law that government not interfere in this bargaining process. This court should not impose on either party its own notions of what is fair or reasonable or economical under the circumstances. Neither the Bankruptcy Code provision (§365) nor applicable case law mandates that this court set any terms or conditions on the rejection and this court declines to do so in this instance.

The unions next argue that if the court is going to allow rejection of the agreements it should impose *conditions* on the rejection, such as requiring Continental to (1) reoffer its pre-petition concession package, (2) reimpose the "non-economic" provision of the agreements, and/or (3) implement those provisions which have been "signed-off" on in the various labor negotiations. The unions cite *In re Parrot Packing Co., Inc.*, 99 C.C.H. Labor case P10, 550 (U.S.D.C. No. Dist. Indiana, Ft. Wayne division, case number 83-10127) August 2, 1983, as precedent for this proposition.

The concessions that were requested pre-petition do not necessarily relate to the current labor cost requirements of Continental. The question of which provisions are in fact non-economic is in issue. Those "signed-off" provisions were not intended by the parties to be binding unless and until a complete and integrated collective bargaining agreement was reached; they were simply tentative and conditional. On the other hand, it is certainly fair for the unions to bring up these

tentative agreements as well as the non-economic provisions in the future bargaining sessions that must take place.

If this court has the authority to impose such conditions it declines to do so in this instance.

The unions, including ALPA, have not seriously challenged with evidence that Continental is in serious financial condition or that it was losing money, nor that it needed serious economic concessions if it were to continue. Nevertheless, ALPA urges that the emergency work rules have inflamed the pilots.

The insult to the unions stems from the effrontery of the employer escaping from the "bonds" of their labor agreements before their very eyes; and in a highly visible way. However, this employer, while it appears to be the same, now has different characteristics and powers. Section 1107 of Title 11 proscribes that a debtor-in-possession has all of the rights, duties, and responsibilities of a trustee. Were there to be an "actual" trustee (i.e. a disinterested third person who could be perceived as acting on behalf of all interested parties) this pill (having this modicum of sweetener) might not be so difficult to consume without even the benefit of liquid refreshment. Small wonder that frustration so conceived is the bearer of ill will and dismay.

Nevertheless, economics have changed substantially in the airline industry. Recognition must be given to this. The ALPA contracts give no such recognition nor any flexibility to deal with the existing circumstances. Under these circumstances, rejection of these burdensome agreements should be, and are, permitted under the law.

To comply with the RLA, ALPA (as well as Continental) must continue to bargain. ALPA must lay aside

other considerations and recognize that this is an economic problem. Economic problems are rarely, if ever, resolved in the courtroom. The striking ALPA pilots need the bargaining expertise of its union now more than ever. If properly and steadfastly exercised, the bargaining ability of ALPA can determine what level of pay and benefits Continental can afford to pay under existing economic circumstances. Whether, ALPA has alienated the working ALPA pilots to the extent that it has lost the leverage of support from this group remains to be seen. However, ALPA and Continental must bargain from the relative positions in which they now find themselves.

Signed this 17th day of August, 1984.

/s/ R.F. Wheless, Jr.
R.F. Wheless, Jr.
U.S. Bankruptcy Judge

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	
	)	
CONTINENTAL AIRLINES, INC.,	)	Case No. 90-932
et al.,	)	through 984
	)	
Debtors.	)	

ORDER APPROVING O'NEILL GROUP
LITIGATION SETTLEMENT

Upon the Motion ("Motion") of Continental Airlines, Inc. ("Continental") to Approve O'Neill Group Litigation Settlement ("Settlement Agreement") filed by Continental on October 22, 1991, the Court having considered said Motion, the Memorandum In Support thereof and the attachments thereto, and the Court having considered the Adair Pilots' objection to said Motion filed November 12, 1991, and the Court having conducted a hearing on said Motion on November 26, 1991, and there appearing good cause therefore, the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Bankruptcy Rule 9019. This matter constitutes a core proceeding pursuant to 24 U.S.C. § 157.

2. Continental filed its petition for relief under Chapter 11 of Title 11 of the United States Code on December 3, 1990 ("Petition Date").

3. Since the Petition Date Continental has continued in the operation and management of its business and properties under §§ 1107 and 1108 of the Bankruptcy Code.

4. The Settlement Agreement (attached as Attachment 1 to the Memorandum in Support of Motion of Continental Airlines, Inc. to Approve O'Neill Group Litigation Settlement) resolves claims with potential value in excess of $100 million against the estate including (a) virtually all of the remaining employee-related claims filed against a corporate predecessor of Continental ("Old CAL") in a prior bankruptcy proceeding in the Bankruptcy Court for the Southern District of Texas ("Continental I"), (b) litigation arising out of a 1985 strike settlement agreement between Old CAL and the Air Line Pilots Association ("ALPA"), and (c) litigation in the Texas state courts arising out of a side Letter between Texas Air Corporation and ALPA. Included among the claims resolved by the Settlement Agreement are claims by over 200 pilots whom Continental has treated as having resigned or retired during the 1983-85 pilot strike at Continental. Those pilots claim a right to reinstatement and backpay which, if successfully prosecuted, would be both costly and extremely disruptive to the interests, seniority and morale of Continental's current pilot workforce.

5. By resolving this litigation, the Settlement Agreement will in large part put an end to a labor dispute that has endured for almost nine years and should enhance morale among the current Continental pilot workforce. The Settlement Agreement further benefits the estate by avoiding litigation of the O'Neill Group's motion to transfer venue of

these proceedings to the Texas bankruptcy court pursuant to 11 U.S.C. § 1014, thereby allowing these proceedings to continue without interruption or delay.

6. Of the $20.9 million of potential consideration available under the Settlement Agreement, approximately $17.9 million or $5.6% has been accepted. Of that total, 30% or approximately $5.4 Million will be paid in cash in 15 equal monthly installments of approximately $360,000 per month, commencing after a plan of reorganization is confirmed herein. Seventy percent of the consideration accepted, or approximately $12.5 million, will be provided in the form of general unsecured pre-petition claims to be scheduled in the name of each settling pilot. In addition, Continental will provide approximately $1.8 million in attorneys' fees to the O'Neill Group's counsel, to be paid in eight monthly installments after confirmation of a plan. The amount of consideration (showing both the cash and claim portion) to be provided for each type of claim settled under the Agreement is set forth below.

Claim Type	Cash	Claim
1. Resigned or retired pilots	$2.16 mil.	$5.04 mil.
2. Furlough Pay	$2.46 mil.	$5.75 mil.
3. Contract Rejection Damages	$350,000	$817,000
4. Other Bankruptcy Claims	$199,500	$465,500
5. Side Letter Claims	$ 36,375	$ 84,875
6. Class Action Claims	$164,250	$383,250

7. A Bankruptcy Court must consider four factors for approving settlement agreements pursuant to Bankruptcy Rule 9019: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of litigation involved, and the expense, inconvenience and delays necessarily attendant to it; and (d) the paramount interests of creditors and a proper deference to their reasonable views in the premises. *See Drexel v. Loomis,* 35 F.2d 800 (8th Cir. 1929), as adopted in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968).

8. First, Continental is fully apprised of all facts necessary to evaluate the risks associated with the claims and litigation being settled, and it is prudent for Continental to eliminate these risks in order to achieve certainty through the Settlement Agreement. Although Continental believes that it has strong defenses to the O'Neill Group's claims and litigation, it also recognizes that, in varying degrees, there are risks associated with that litigation and that continuation of these claims and litigation will impose a significant burden on the estate.

9. Second, the claims are all adverse to Continental and thus present no "difficulties in the matter of collection."

10. Third, the litigation with the O'Neill Group has endured for over nine years and has consumed large quantities of management resources and legal fees. Disapproval of the Settlement Agreement would result in continued litigation with the O'Neill Group on many fronts and the continued expenditure of significant time, attention, and money, all to the detriment of Continental and its

creditors. Resolution of the O'Neill Group's litigation will enable Continental to focus on achieving a successful reorganization, not on past disputes, and will thus enhance the labor relations climate at Continental.

11. Fourth, the Settlement Agreement serves the interests of Continental's creditors by, in addition to the benefits described above, avoiding any disruption of these proceedings that might occur if Continental were required to litigate the O'Neill Group's motion to transfer venue of this bankruptcy case. Thus, the Settlement Agreement will hasten a successful reorganization.

12. The Official Committee of Unsecured Creditors has not objected to approval of the Settlement Agreement.

13. The Court has considered the objections of the Adair Pilots, finds them to be without merit, and they are denied.

14. The Court therefore concludes that the Settlement Agreement is in the best interests of Continental's estate.

Based on the foregoing, IT IS HEREBY ORDERED, this 26th day of November, 1991 that

1. The Motion of Continental Airlines, Inc. to Approve O'Neill Group Litigation Settlement is granted.

2. The Settlement Agreement, attached as Attachment 1 to the Memorandum in Support of Motion of Continental Airlines, Inc. to Approve O'Neill Group

Litigation Settlement, is approved in its entirety pursuant to Bankruptcy Rule 9019.

3. Continental is authorized to execute of Settlement Agreement.

/s/ Helen S. Balick
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

No. 91-2014

In The Supreme Court Of The United States

OCTOBER TERM, 1991

O'NEILL GROUP, et al., *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

PETITIONERS' REPLY

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I. Respondent's Brief In Opposition Fails To Address Several Key Points In The Petition For Writ Of Certiorari.

This case concerns the proper measure of contract rejection damages under section 502 of the Bankruptcy Code. Petitioners, a large group of former and present pilots and flight attendants at Continental Airlines, maintain that the Fifth Circuit mismeasured their contract rejection damages in a fashion that is inconsistent with this Court's previous rulings and with basic principles of labor and bankruptcy law. Respondent Continental Airlines, the bankrupt employer that rejected its long-standing labor contracts with the pilots and flight attendants, contends that the Fifth Circuit decision was perfect in all respects.

Respondent's brief is notable for its failure to address three critical points. First, respondent's brief does not attempt to explain how the Fifth Circuit decision can be reconciled with this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Addressing § 502(c)(2) of the Bankruptcy Code, *Bildisco* expressly held that job rights such as seniority were compensable as contract rejection damages. *Id.* at 530 n.12. As there is no practical distinction between seniority in *Bildisco* and wages here — both accrue only if the employer continues to operate — the Fifth Circuit's added condition that employees prove a guarantee of continued employment before receiving contract rejection damages is clearly inconsistent with this Court's analysis in *Bildisco*.[1]

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[1] The Fifth Circuit decision also expands the powers of the bankruptcy courts beyond what is allowed by the plain language of the Code, authorizing them to consider what would have happened absent the rejection or to disallow damages for contracts that would have otherwise caused the debtor to cease operations. This Court has repeatedly rejected similar attempts to expand the powers of bankruptcy courts beyond what is expressly provided for in the Code. *See Union Bank v. Wolas*, 112 S. Ct. 527 (1991); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

Second, respondent's brief does not try to explain how the bankruptcy laws can be construed to allow a debtor to finance its recovery on the backs of a discrete group of creditors, in this case its employees. Respondent concedes that Continental paid all of its unsecured creditors in full, including those whose contracts it rejected, with the singular exception of the pilots and flight attendants. This group received virtually nothing, even though the demise of the airline would have affected all unsecured creditors equally.

Third, respondent's brief does not address the increase in the number of bankruptcy filings by major employers, with the concomitant risk that this issue will recur in another case again affecting a large body of workers. Combined with respondent's admission that § 1113 of the Bankruptcy Code does not address the issue of how to measure contract rejection damages, there is no reason whatsoever why the first appellate case should not be decided correctly.[2] Therefore, the Court should grant the petition for a writ of certiorari to enunciate the proper measure of contract rejection damages as foreshadowed in *Bildisco*.

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[2] Respondent urges this case is not particularly significant because (1) most of the petitioners have settled and (2) § 1113 of the Bankruptcy Code reduces the likelihood that this dispute will arise again. As to the settlement, respondent neglects to instruct the Court that it is not yet final, and will not be final, until Continental emerges from bankruptcy. Continental is currently in its second bankruptcy in less than a decade, and has remained under the protection of Chapter 11 for the last eighteen months without filing a plan of reorganization. Thus, to divest more than 450 pilots of their still-viable claims because of the settlement is premature.

As to § 1113, it simply will not prevent the same question from arising again. In fact, it would not have had any effect in this case. All § 1113 does is prescribe a procedure for the rejection or modification of an existing collective bargaining agreement, requiring the employer to "confer in good faith." 11 U.S.C. §§ 1113(b) & 1113(e). Sections 1113(b) and (e) say nothing about the proper measurement of contract rejection damages once a collective bargaining agreement is rejected.

II. Respondent's Brief Contains Several Misstatements Of Fact And Of Law.

As to the points respondent's brief actually addresses, at least three merit a brief reply because they contain misstatements of fact or law.

A. Petitioners Are Not Collaterally Estopped from Asserting a Constructive Discharge.

Respondent incorrectly suggests petitioners are collaterally estopped from alleging that Continental's unilateral changes in their working conditions constituted a constructive discharge by the decision in *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D.Tex. 1985). In *In re Continental*, the court held that no claim in bankruptcy existed for wrongful discharge arising from the rejection of a labor contract because such claims had to be presented as contract rejection claims under § 502. *Id.* at 850. To rely on *In re Continental* as a bar in this action would place petitioners in an unjust catch-22: they would not have a remedy for contract rejection because they were not constructively discharged, but they also could not pursue a constructive discharge claim because contract rejection damages are the exclusive remedy.

Further, the wrongful discharge finding in *In re Continental* has been appealed. As noted in *In re Continental*, it was first held that there was no constructive discharge when Judge Roberts granted Continental's summary judgment motion on the pilots' contract rejection claim. That order is the subject of this appeal, and the petitioners clearly should not be required to appeal a later determination of the same conclusion which is already under appeal.

B. Labor Law Permits Strikers to Recover Back Wages.

Contrary to respondent's suggestion, courts have regularly held that, under circumstances applicable here, strikers can recover back pay for the period that they were on strike. As noted in the petition, back pay is appropriate when employees strike in

response to certain unfair labor practices, such as when the employer drastically alters the terms of employment. *See, e.g., NLRB v. Haberman Constr. Co.*, 618 F.2d 288 (5th Cir. 1980), *aff'd in relevant part en banc*, 641 F.2d 351 (5th Cir. 1981). Continental engaged in just such an unfair labor practice when it slashed the pilots' wages and benefits in half under its emergency work rules.[3]

C. The Fifth Circuit's Decision Awards Continental a Windfall.

Respondent does not cite any authority, and there is none, for the "rule" that an employee's refusal to work for reduced wages terminates his claim for back wages in its entirety. To the contrary, in his dissent, Judge Garwood correctly stated the established law. An employee's failure to mitigate damages simply reduces his recovery; it does not eliminate damages altogether as the Fifth Circuit held. *See* E. Farnsworth, *Contracts* § 12.12, at 858-62 (1982). This difference between reduction and elimination is the windfall reaped by Continental under the Fifth Circuit's decision, as the court required the pilots to work under Continental's diminished wage scale or forfeit all rejection damages.

Another windfall is the Fifth Circuit's limitation of contract damages to the six days the bankruptcy court thought the airline would remain operational without the rejection of the labor contracts.[4] This too misses the point. The fact is that Continental remained in business, flew out of bankruptcy, and honored all of

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[3] Under *Bildisco*, the remedy is still contract rejection damages, not injunctive relief or other unfair labor practice remedies. *Bildisco*, 465 U.S. at 530. *See Mungin v. Florida East Coast Ry.*, 416 F.2d 1169 (5th Cir. 1969) (enumerating remedies for unfair labor practices under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*).

[4] To the extent this case turns on critical issues of fact left to the discretion of Judge Roberts, a rehearing is necessary. A conflict was created in the proceedings below when Continental's local bankruptcy counsel extended to Judge Roberts an offer of employment, admittedly "before the rulings" on appeal here, and he accepted the offer immediately after awarding Continental $700,000 in fees. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261-63 (5th Cir. 1990).

its rejected contracts in full, except for petitioners' labor contract. Respondent provides no reason why it should be allowed to prefer other creditors over these employee claimants. There simply is none.

CONCLUSION

The strong grounds presented in the petition showing the national importance of granting certiorari have in no way been diminished by the brief in opposition. With the growing number of bankruptcy filings by major companies and the large number of employees with collective bargaining agreements affected thereby, it is vital that the Court address the issue of how to correctly measure contract rejection damages now. The fundamentally unjust and harsh rule advocated by the Fifth Circuit, which is in serious conflict with basic labor and bankruptcy law, cannot be allowed to lead the way.

RESPECTFULLY SUBMITTED, July 1992.

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